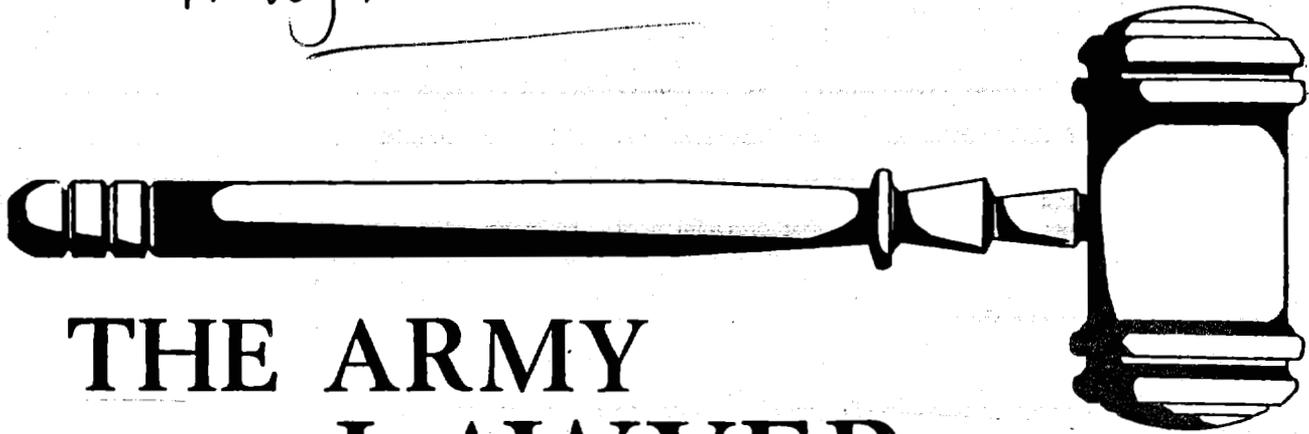


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Captain Matthew E. Winter

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The Divestiture Defense and *United States v. Collier*

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Introduction

The military is a distinctly hierarchical society.¹ This fundamental and pervasive aspect of military life is reflected in countless ways. For example, the military's rank structure, the requirements of military courtesy, and the establishment of separate housing areas and clubs for commissioned officers, noncommissioned officers (NCOs), and other enlisted personnel all manifest the uniquely structured character of the Armed Forces.

Certain members of military society—commissioned officers, warrant officers, and NCOs—sit atop the hierarchy.² Their special status and authority within the hierarchy is protected and reinforced by various means, including the Uniform Code of Military Justice (UCMJ).³ Under the provisions of the UCMJ it is criminal to be disrespectful⁴ or disobedient⁵ to someone who occupies a special status. The Code also prohibits the impersonation of individuals who occupy such positions.⁶ These are but a few examples of how the UCMJ protects those who command and supervise the military.⁷

A logical corollary to the structured relationships and associated requirements of military life is the idea that individuals who do not act commensurate with that special status lose the special protection normally afforded them.⁸ This is the essence of the divestiture defense. Before 1988, the divestiture defense appeared to be well-settled under military law. An authoritative consensus, as reflected in the case law and the Manual for Courts-Martial, had apparently been achieved with

respect to the scope of the defense, the situations to which it applied, and the manner in which it was raised.⁹

This consensus was tested by the recent case of *United States v. Collier*.¹⁰ In *Collier* the Army Court of Military Review declined to apply the divestiture defense and affirmed the accused's conviction for disobeying the lawful order of a warrant officer. *Collier* is noteworthy, not only for the court's analysis regarding whether the defense was established by the facts of the case, but also for the court's characterization of the defense as an affirmative defense and for the court's willingness to consider the application of the defense to a disobedience charge.

Before the importance and persuasiveness of *Collier* can be evaluated meaningfully, however, the decision must be placed in a proper context. Accordingly, this article will review the origins and development of the divestiture defense, its current scope, and its application under military law. After that has been accomplished, *Collier* will be considered.

The Origins and Development of the Divestiture Defense

The divestiture defense has its origins in relatively recent military decisional law. Indeed, Colonel Winthrop's treatise on military law makes no mention of the defense,¹¹ and the first reported case to address the concept of divestiture as a defense was not decided until

¹ See *United States v. Means*, 10 M.J. 162, 166 (C.M.A. 1981); see generally TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, The Army Lawyer, Feb. 1989, at 62.

² The Court of Military Appeals, in describing the special status of commissioned officers, has written: "In short, the Armed Services comprise a hierarchical society, which is based on military rank. Within that society commissioned officers have for many purposes been set apart from other groups." *Means*, 10 M.J. at 166; see also *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953).

³ 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

⁴ A violation of UCMJ art. 89 (disrespect toward a superior commissioned officer) and art. 91 (insubordinate conduct toward a warrant officer, NCO, or petty officer); see also UCMJ art. 88 (contempt toward officials, which proscribes the use of contemptuous words against the President, Vice-President, Congress, Secretary of Defense, the Secretary of a military department, and other named high officials by commissioned officers).

⁵ A violation of UCMJ art. 90 (assaulting or willfully disobeying a superior commissioned officer) and art. 92(2) (disobeying other orders issued by members of the Armed Forces).

⁶ A violation of UCMJ art. 134; Manual for Courts-Martial, United States, 1984, Part IV, para. 86 [hereinafter MCM, 1984]; see *United States v. Collymore*, 29 C.M.R. 482 (C.M.A. 1960); *United States v. Demetris*, 26 C.M.R. 192 (C.M.A. 1958).

⁷ A concomitant reflection of the military's hierarchical society is recognized by the UCMJ in making criminal some types of conduct solely because of the special status of the accused person: for example, conduct unbecoming an officer and a gentleman (UCMJ art. 133; see *Means*, 10 M.J. at 162 ("Since officers have special privileges and hold special positions of honor, it is not unreasonable that they be held to a higher standard of accountability")); fraternization (UCMJ art. 134; MCM, 1984, Part IV, para. 83; see *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1955)); and gambling with a subordinate (UCMJ art. 134; MCM, 1984, Part IV, para. 84).

⁸ See generally *supra* note 7.

⁹ Whether the President's view of the defense as reflected in the Manual is authoritative or instead exceeds his authority under UCMJ arts. 36 and 56, is unclear. Compare *Ellis v. Jacob*, 26 M.J. 90, 92 (C.M.A. 1988) (President may not change military law to eliminate the defense of partial mental responsibility) with *United States v. Jeffress*, 28 M.J. 409 (C.M.A. 1989) (President may require a more restrictive definition of kidnapping under a "pure" UCMJ art. 134 theory). This issue, as it applies to divestiture, will be considered later in this article.

¹⁰ 27 M.J. 806 (A.C.M.R. 1988), *pet. granted on another issue*, 28 M.J. 344 (C.M.A. 1989).

¹¹ See generally W. Winthrop, *Military Law and Precedents* (2d ed. 1920).

1956.¹² Divestiture, in fact, has been discussed so infrequently by the appellate courts and boards that the important cases can be summarized easily in a few paragraphs.

The first significant divestiture case was *United States v. Noriega*.¹³ The accused in *Noriega*, a basic airman, was charged with being disrespectful¹⁴ to a male lieutenant. Just prior to the incident, the lieutenant removed his shirt and was acting as a bartender at a party attended by the accused. The accused was drinking heavily, and he became aggressive and threatening. As he was being escorted from the party by some friends, the accused encountered the lieutenant, who stopped the group and ordered them to allow the accused to have "a couple more drinks."¹⁵ Later, the accused appeared in front of the lieutenant at the bar and raised his hands in a fighting pose while challenging, "Hey, Tip, let's fall out on the green."¹⁶ The lieutenant walked away without further incident.

The Court of Military Appeals reversed the accused's conviction for disrespect under these circumstances. The court found that the lieutenant's actions—stripping to the waist, serving drinks, and ordering the accused to become more intoxicated—made the lieutenant, in appearance and conduct, no more than a bartender. The court concluded, therefore, that the accused's challenging words and actions did not detract from the authority or person of the lieutenant within the meaning of article 89, which proscribes disrespect toward commissioned officers.¹⁷ Accordingly, although the term "divestiture" was never expressly used by the court, a de facto divestiture defense was recognized for a charge of disrespect.¹⁸

Thirteen years later, in *United States v. Revels*,¹⁹ the Army Court of Military Review set aside the accused's conviction for disrespect to a superior commissioned officer and a superior noncommissioned officer. In *Revels* the court found that the officer's and NCO's provoking, abusive, and brutal treatment of the accused, which precipitated the charged disrespectful behavior, had divested both victims of their protected status.²⁰ The court, in fact, used the term "divest" for the first time, writing:

The confinement officer and the first sergeant by reason of their gross improprieties divested themselves of their right to be respected. They precipitated the alleged military offenses of disrespect by stepping so far out of character that each divested himself, as to these offenses charged, of that authority, respect, and deference which is due them.²¹

The accused's conviction for disobeying the same officer²² was also reversed, but this was not because of divestiture. Even though the officer's egregious conduct was equally the cause of the alleged disobedience, the court instead chose to reverse the accused's conviction for this offense because of factual insufficiency.²³ Divestiture was allowed as a defense for disrespect, although the court did not consider it to be a defense to a disobedience charge.

In *United States v. Garretson*,²⁴ decided the following year, the Army Court of Military Review set aside the accused's conviction for assaulting an individual who was performing military police duties. The court held that the accused's guilty plea had been improvident

¹² An earlier case that addressed an issue relating to divestiture is *United States v. Meland*, 8 C.M.R. 822 (A.F.B.R. 1953), in which the board found that an air policeman was not in the execution of air police duties when he physically removed the accused from a mess hall. Accordingly, the accused's conviction for assault upon a noncommissioned officer in the execution of air police duties was reversed; the accused's conviction for the lesser included offense of assault upon a noncommissioned officer was, however, affirmed.

¹³ 21 C.M.R. 322 (C.M.A. 1956).

¹⁴ A violation of UCMJ art. 89.

¹⁵ *Noriega*, 21 C.M.R. at 324.

¹⁶ *Id.*

¹⁷ *Noriega* can be contrasted with *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953), decided three years earlier, where the Army Board of Review found that, although the victim's participation in a poker game with the accused (a subordinate officer) allows a greater degree of familiarity than would otherwise be permitted, this does not confer upon the subordinate officer the right to direct obscene or abusive language toward the other participants who are superior in rank.

¹⁸ The court also noted that, because the lieutenant did not testify at the trial, this was some evidence that the conduct was not offensive under the circumstances. *Id.*

¹⁹ 41 C.M.R. 474 (A.C.M.R. 1969). In the interim between *Noriega* and *Revels*, the Court of Military Appeals, in *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958), rejected what was essentially a divestiture defense to the accused's conviction for disrespect to a superior commissioned officer. The court in *Ferenczi* did not render its opinion in terms of divestiture, but based its affirmance on "factual sufficiency." The court found the members could reasonably conclude that the accused was lying when he claimed that he disrespectfully spoke to and walked away from a superior commissioned officer because the officer had challenged him to a fight and because he (the accused) was afraid and did not want to strike the officer. *Ferenczi*, 27 C.M.R. at 80-81.

²⁰ The officer and NCO, who were the accused's confinement officer and first sergeant, punched and kneed the accused and yelled obscenities at him at the confinement facility. *Id.* at 479-80.

²¹ *Id.* at 481.

²² A violation of UCMJ art. 90.

²³ See generally UCMJ art. 67 (courts of review may make a de novo determination of factual sufficiency).

²⁴ 42 C.M.R. 472 (A.C.M.R. 1970).

because of the potential divestiture defense. The accused's statements during the providence inquiry—that the alleged victim's verbal and physical abuse precipitated the charged assault—raised a matter inconsistent with the accused's guilty plea. The court concluded that, under these circumstances, the law officer's failure to inquire into and resolve this matter required that the guilty plea be set aside.²⁵

Later that year, in *United States v. Johnson*,²⁶ the court reversed the conviction of a Black soldier accused of assaulting and being disrespectful to a superior commissioned officer. Just prior to the alleged offenses, the officer addressed the accused using the word "boy."²⁷ The accused responded by speaking disrespectfully to the officer and striking him on the head. The court held that the officer had divested himself of his protected status by calling the accused a racially offensive term. Nevertheless, the court affirmed the accused's conviction for the lesser included offense of assault by battery.²⁸

The Court of Military Appeals next addressed divestiture in *United States v. Struckman*.²⁹ The accused in *Struckman* reported to his commanding officer, who advised the accused of his rights³⁰ and then proceeded to question the accused about his civilian background and attitude toward the Marine Corps. During the questioning, the officer called the accused a coward and told him that he was not "a man" and that he had a "two-foot 'streak of yellow' down his back."³¹ When the officer then asked the accused what he would like, the accused responded that he would "like to see the Marine Corps flat on its back with its heels in the air."³² The officer approached the accused, stated that "he" represented the Marine Corps, and challenged the accused to try put him on his back.³³ The accused responded by punching the officer in the face.³⁴

The accused's conviction for assault upon a superior commissioned officer was reversed. Although the court never used the term "divestiture," it clearly applied the defense when it observed:

To us, the evidence portrays a situation in which the commander, by words and action, abandoned his position and his rank. In consequence, the accused's response to the words and conduct "did not, as a matter of law, detract from the authority and the person" of the commander, as a commander or as a commissioned officer.³⁵

Within two weeks of *Struckman*, the Air Force Court of Military Review considered the divestiture defense in *United States v. Cheeks*.³⁶ The accused in *Cheeks*, who was confined in a detention facility, was under the continuing supervision of an NCO named Skipper. Over a period of several months, Skipper repeatedly addressed the accused as "Shits" or "Airman Shits," despite the accused's frequent requests that he be called by his proper name.³⁷ On the occasion at issue, Skipper shouted to the accused, "Shits, fall out to go on detail," or words to that effect, and then continued to address the accused by the same demeaning name. The accused responded that he would not comply until Skipper called him "Cheeks." The accused and Skipper then became engaged in a heated exchange in which the accused was clearly disrespectful. In addition, the accused never obeyed Skipper's order to perform the detail.³⁸

The court reversed the accused's conviction for disrespect, finding that Skipper's gross and prolonged misconduct had divested him of his special status as an NCO. The court, however, expressly declined to apply the divestiture defense to excuse or to justify the accused's disobedience of Skipper's order to perform the detail. The court concluded that, although divestiture might theoretically be available as a defense to a

²⁵ *Id.* at 473-74; see UCMJ art. 45. This requirement to resolve potential defenses in guilty plea cases was recently reiterated by the Court of Military Appeals in *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989) (military judge must resolve an entrapment defense if raised during a guilty plea case before the plea can be accepted).

²⁶ 43 C.M.R. 604 (A.C.M.R. 1970).

²⁷ *Id.* at 605.

²⁸ *Id.* at 605-06.

²⁹ 43 C.M.R. 333 (C.M.A. 1971).

³⁰ See UCMJ art. 31.

³¹ *Struckman*, 43 C.M.R. at 334.

³² *Id.*

³³ *Id.*

³⁴ The reported facts indicate further that the squadron first sergeant, who witnessed the exchange between the officer and the accused, immediately grabbed the accused and pushed him into a wall. *Id.*

³⁵ *Id.* at 335. The court did not address whether the accused could nonetheless be convicted of the lesser included offense of simple assault by battery, because the "nature of the remaining offense and the expiration of the period of confinement that was imposed make it inappropriate to continue the proceedings." *Id.* (citing *United States v. Evans*, 39 C.M.R. 3 (C.M.A. 1968)).

³⁶ 43 C.M.R. 1013 (A.F.C.M.R. 1971).

³⁷ Skipper later explained his use of language by claiming that he was unable to pronounce the accused's name. *Id.* at 1015.

³⁸ *Id.* at 1016.

disobedience charge, "verbal abuse would not, standing alone, serve to vitiate a legitimate order."³⁹ The court wrote:

It is one thing to conclude, out of simple considerations of human dignity, that a superior forfeits his right to be treated with respect by a subordinate upon whom he has heaped verbal abuse. It is quite another matter, however, to conclude that a subordinate is vested with a license to disobey any order administered in a verbally abusive manner. We are simply not prepared to risk the devastation of discipline likely to be visited upon the military establishment as a consequence of such a conclusion.⁴⁰

In *United States v. Hendrix*⁴¹ a lieutenant was in the process of conducting an authorized search of the accused's quarters for narcotics when he found a letter addressed to the accused. Although the accused asked the lieutenant to put the letter down, the lieutenant continued to read it. The accused responded to this by "lightly" pushing the lieutenant.⁴² The court reversed the accused's conviction for assault upon a superior commissioned officer and concluded that the lieutenant had exceeded his official authority and that he had therefore not been acting in the execution of his office.⁴³ Consequently, the accused's response did not, as a matter of law, detract from the authority of the lieutenant as a commissioned officer.⁴⁴

The next important case dealing with divestiture was *United States v. Richardson*.⁴⁵ The accused in *Richardson* was convicted of assaulting and being disrespectful to a superior commissioned officer and a superior NCO. The misconduct by the accused, who was Black, was in response to the officer's and NCO's use of the racially insulting and provocative term "boy." The Court of

Military Appeals found that, even though divestiture was raised, the accused could nonetheless be convicted of the lesser included offenses of provoking speech⁴⁶ and simple assaults by battery. The court concluded that the divestiture of the victims' special status did not confer immunity upon the accused for every offense directed against the same victims. Specifically, the court found that the accused was not justified in responding physically to words alone, nor could his provoking speech be justified by the fact that he was replying to similar language.⁴⁷

The last reported case to address divestiture prior to *Collier* was *United States v. Pratcher*.⁴⁸ In *Pratcher* a lieutenant had repeatedly counselled the accused about three complaints from a creditor concerning the accused's failure to pay for car repairs.⁴⁹ On one occasion, the lieutenant acquired the accused's car keys and then refused to return them, despite the accused's continued requests. Later, both the lieutenant and the accused stepped outside, where the accused could see that his car was in the process of being repossessed. The accused was quite angry and became embroiled in a heated exchange with the lieutenant. During this encounter, the accused directed profanity toward the lieutenant, although the lieutenant did not respond in kind.⁵⁰

Although the lieutenant's actions were not consistent with the then applicable Army regulation,⁵¹ the court found that they were not so outrageous as to deprive the victim of his status as an officer.⁵² In a concurring opinion essentially shared by Judge Cook, Chief Judge Everett observed that the officer "was not off on a complete 'frolic of his own';"⁵³ the officer was instead "seeking to perform his duties as [the accused's] superior officer at the time of the alleged offense . . . and so he was not divested of his right to be treated with respect by [the accused]."⁵⁴

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 45 C.M.R. 186 (C.M.A. 1972).

⁴² *Id.* at 190-91.

⁴³ *Id.* at 191-92.

⁴⁴ *Id.* at 192. The court did not address the accused's possible guilt of the lesser included offense of simple assault by battery because the court members were not instructed as to this offense. *Id.*

⁴⁵ 7 M.J. 320 (C.M.A. 1979). In the interim, the Court of Military Appeals decided *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976). The court held in *Rozier* that the accused's conduct, which amounted in fact and law to an escape from unlawful custody, could not form the basis for a charge of being disrespectful to the noncommissioned officers who were confining him. *Id.* at 472.

⁴⁶ A violation of UCMJ art. 117.

⁴⁷ *Richardson*, 7 M.J. at 322.

⁴⁸ 17 M.J. 388 (C.M.A. 1984).

⁴⁹ *Id.* at 388-89.

⁵⁰ *Id.* at 389.

⁵¹ See Army Reg. 600-15, Personnel-General: Indebtedness of Military Personnel, para. 1-4 (15 Nov. 1979), cited in *Pratcher*, 17 M.J. at 389.

⁵² *Pratcher*, 17 M.J. at 389.

⁵³ *Id.* (Everett, C.J., concurring).

⁵⁴ *Id.* at 390 (Everett, C.J., concurring).

The Divestiture Defense as Currently Recognized Under Military Law

As the military decisional law clearly indicates, divestiture is recognized as a defense to certain offenses where the status of the victim is relevant. The 1984 Manual for Courts-Martial accurately summarizes the scope and elements of the divestiture defense as it applies in the case of officer victims:

A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of [that status]. That accused may not be convicted of [certain offenses having as an element that the victim had a special status when] the officer . . . has . . . lost the entitlement to respect protected by [the UCMJ because of the officer's status.]⁵⁵

The defense can also apply to an NCO victim if the victim's status is relevant to the offense.⁵⁶

The defense, as reflected in the above definition, has three elements. First, the victim's conduct must be related to the accused. An accused would therefore not be entitled to the defense if the egregious conduct by the victim was unrelated to the accused. This requirement for a nexus between the victim's behavior and the accused does not mean, however, that the victim could never lose his or her protected status with respect to the accused for conduct related to the accused but directed at another. For example, assume that an officer or NCO verbally abuses an accused's roommate in the accused's presence so that the roommate would be entitled to the divestiture defense for a disrespect charge. Under these circumstances, the accused might also be entitled to the defense, provided that a sufficient nexus between the accused and the officer's abusive conduct is present. Although no reported case has directly addressed this

issue, such a result would be consistent with the application of other defenses under military law.⁵⁷

Second, whether the victim's conduct triggers a divestiture defense must be considered under all of the circumstances.⁵⁸ The words spoken by the victim or the behavior that the victim manifests cannot be viewed in the abstract for purposes of divestiture. The victim's conduct must instead be evaluated in the context in which it occurs. The courts and boards that have considered this issue have recognized that the circumstances surrounding the victim's acts are often crucial in determining the degree of formality or familiarity with which the victim lawfully can be treated.⁵⁹ The accused's circumstances would likewise be relevant to the issue of divestiture and to whether the accused's conduct was criminal. For example, a soldier receiving fire in a foxhole or laboring in a motor pool might be given more leeway in using colorful language to address an NCO than would a soldier drilling for a parade or receiving formal counselling.

Third, the victim's departure from the required standards must be substantial. The courts and boards have held that substantial departures can include provoking and abusive words: for example, directing racial slurs at the accused⁶⁰ or calling the accused an obscene or personally insulting name.⁶¹ Substantial departures can also be constituted by the behavior of the victim independent of any words: for example, challenging the accused to a fight,⁶² unlawfully confining the accused,⁶³ or reading a personal letter addressed to the accused without any color of authority.⁶⁴ As long as the victim otherwise acted pursuant to an official purpose, a substantial departure is not constituted merely because the victim violated an Army regulation.⁶⁵

Assuming that the elements of the divestiture are satisfied, the next issue is whether the defense may be interposed for the offense that is charged. Initially, of course, the defense of divestiture could apply only to those offenses in which the victim's status or position is

⁵⁵ MCM, 1984, Part IV, para. 13c(5). This paragraph is taken from the Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 168 [hereinafter MCM, 1969]. See MCM, 1984, Part IV, para. 13c(5) analysis.

⁵⁶ See MCM, 1984, Part IV, para. 15c(5), which incorporates by reference Part IV, para. 13c(5).

⁵⁷ For example, the concept of self-defense can be applied more broadly pursuant to the defense of another as recognized under R.C.M. 916(e)(5); see, e.g., *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963); *United States v. Hernandez*, 19 C.M.R. 822 (C.M.A. 1955).

⁵⁸ This prerequisite for divestiture is arguably not an element, but rather is descriptive of other elements. Such a distinction is largely semantic. In any event, several offenses and defenses under military law contain descriptive elements. See, for example, the third and fourth elements for attempts under UCMJ art. 80, which describe the type of overt act required for an attempt. MCM, 1984, Part IV, para. 4b(3)&(4).

⁵⁹ See *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (victim's participation in a poker game understandably results in him being accorded greater familiarity); see also *United States v. Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988) (commissioned officer's participation on a softball team with enlisted soldiers inevitably leads to a relaxation of the normal superior-subordinate relationship); see generally TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, *The Army Lawyer*, Feb. 1989, at 62, 64-65.

⁶⁰ E.g., *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

⁶¹ E.g., *United States v. Struckman*, 43 C.M.R. 333 (C.M.A. 1971); *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971).

⁶² *Struckman*, 43 C.M.R. 333 (C.M.A. 1971).

⁶³ *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976).

⁶⁴ *United States v. Hendrix*, 45 C.M.R. 186 (C.M.A. 1972).

⁶⁵ *United States v. Pratcher*, 17 M.J. 388 (C.M.A. 1984).

an element of proof. To allow the defense for offenses like larceny⁶⁶ or rape⁶⁷ would be illogical.⁶⁸

The case law and the Manual explicitly recognize that the defense can arise where the accused is charged with disrespect to a superior commissioned officer⁶⁹ or to an NCO.⁷⁰ Decisional law also permits divestiture to act as a partial defense⁷¹ to assault upon a superior commissioned officer⁷² or upon an NCO.⁷³ Although the Manual does not expressly recognize divestiture as a defense to this form of aggravated assault, the analysis in the Manual favorably cites case authority that supports this proposition.⁷⁴ Case law also indicates that divestiture can act as a partial defense for assault upon a person performing military police duties.⁷⁵

The decisional law seems equally clear that divestiture does not apply to disobedience offenses. No reported case has allowed divestiture for a disobedience charge. This issue is discussed at length in *United States v. Cheeks*.⁷⁶ In *Cheeks* the court refused to apply the divestiture defense for the accused's disobedience of an NCO's order even though divestiture was allowed for a

disrespect charge toward the same victim.⁷⁷ Similarly, although the Manual⁷⁸ and the Military Judges' Benchbook⁷⁹ permit divestiture as a defense to disrespect offenses, they do not recognize the defense for disobedience charges.⁸⁰ Based upon all of the foregoing authority, military law—at least prior to *Collier*—appeared well settled that an accused charged with disobedience could not use the divestiture defense, regardless of the victim's conduct.

The reason for the different application of divestiture for disrespect and disobedience offenses seems founded upon the distinctive bases of the two crimes. The gravamen of a disrespect charge is harm to the status of the victim. When a subordinate is disrespectful to a superior, the subordinate necessarily flouts the protected status of the offended officer or NCO. Conversely, when the victim of a disrespect charge has departed substantially from the required standards of conduct, the victim no longer deserves protection.⁸¹ Disrespect, in short, is inextricably related to the status and conduct of the victim.

⁶⁶ A violation of UCMJ art. 121.

⁶⁷ A violation of UCMJ art. 120.

⁶⁸ The Court of Military Appeals has held in a different context that evidence of good military character may be relevant and admissible even where an accused is charged with a "non-military" offense. *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983) (evidence of good military character is relevant and admissible to defend against charges of larceny, wrongful appropriation, and unlawful entry, where the accused, who was functioning as a charge of quarters, claimed he did these acts to teach subordinates a lesson in security and to personally secure the property in accordance with his military responsibilities); *see also* *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (evidence of good military character is relevant when an accused defends on the basis of lack of mental responsibility). A corresponding expansion of the divestiture defense to "non-military" crimes, however, is not supported by the rationale of *Clemons* or *Benedict*. This is because the divestiture defense focuses upon the military status and behavior of the victim and not of the accused. The military status of the accused is irrelevant as a matter of proof for virtually all common law offenses. At most, divestiture might be expanded to apply in some circumstances when the accused is charged with conduct unbecoming an officer and a gentleman or violating the general article, provided the victim's status is germane to the particular charge in that case.

⁶⁹ MCM, 1984, Part IV, para. 13c(5); *e.g.*, *United States v. Noriega*, 21 C.M.R. 322 (C.M.A. 1956); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970); *United States v. Revels*, 41 C.M.R. 474 (A.C.M.R. 1969).

⁷⁰ MCM, 1984, Part IV, para. 15c(5) (which incorporates by reference Part IV, para. 13c(5)); *see, e.g.*, *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976); *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971); *United States v. Revels*, 41 C.M.R. 474 (A.C.M.R. 1969).

⁷¹ *See Richardson*, 7 M.J. at 322. The court in *Richardson* also found that, in the appropriate case, provoking speech could be affirmed as a lesser included offense to disrespect where the accused was entitled to the divestiture defense for the greater offense of disrespect. *Id.*

⁷² *See id.*; *United States v. Hendrix*, 45 C.M.R. 186 (C.M.A. 1972); *United States v. Struckman*, 43 C.M.R. 333 (C.M.A. 1971); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

⁷³ *Richardson*, 7 M.J. 320 (C.M.A. 1979).

⁷⁴ MCM, 1984, Part IV, para. 13c(5) analysis (citing *Richardson*, 7 M.J. 320 (C.M.A. 1979)).

⁷⁵ *United States v. Garretson*, 42 C.M.R. 472 (A.C.M.R. 1970); *United States v. Meland*, 8 C.M.R. 822 (A.F.B.R. 1953).

⁷⁶ 43 C.M.R. 1013 (A.F.C.M.R. 1971); *see also* *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

⁷⁷ *Id.* at 1016-17.

⁷⁸ MCM, 1984, Part IV, paras. 13c(5) and 15c(5).

⁷⁹ Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-19b (1 May 1982) [hereinafter Benchbook] provides: The evidence has raised an issue as to whether [the victim] conducted himself/herself prior to the charged offense in a manner which took away his/her status as a superior to the accused. An officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards of an officer and gentleman/lady appropriate to that officer's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances including but not limited to (*specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides*).

You may find the accused guilty of (*specify the offense(s)*) only if you are satisfied beyond a reasonable doubt that [the victim] by his/her (conduct) (and) (language) did not abandon his/her status as a superior commissioned officer of the accused. *Id.* (emphasis in original).

⁸⁰ In fact, the Manual favorably cites case authority that holds that divestiture could not generally be a defense to a disobedience charge. MCM, 1984, Part IV, para. 13c, analysis (citing *Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971)).

⁸¹ Whether the accused's disrespectful conduct is thus excused or justified will be considered at *infra* notes 95-114 and accompanying text.

The gravamen of a disobedience charge, on the other hand, is the failure to obey a lawful order based upon a military purpose.⁸² Flouting the authority of the officer or NCO who issued the order is not required to prove disobedience.⁸³ Accordingly, the military as a whole, rather than the issuing authority, is the primary victim of a disobedience offense, and the victim's protected status is not necessarily challenged when a subordinate politely refuses to obey the victim's order. Disobedience, in short, is not directly connected to the status and conduct of the issuing authority.⁸⁴

Lastly, assuming that the elements of the divestiture defense are satisfied and that the defense applies to the offense charged, a final question remains regarding whether the military judge has a sua sponte duty to instruct on the defense. Military law requires that the military judge instruct sua sponte on all special defenses⁸⁵ reasonably raised by the evidence.⁸⁶ Conversely, judges are generally under no obligation to instruct on other defenses unless the trial defense counsel specifically requests the instruction.⁸⁷

Whether divestiture should be regarded as a special defense is not entirely clear.⁸⁸ Rule for Courts-Martial 916, which is generally thought to include all special defenses under military law, does not mention divesti-

ture. The present Manual rule and its predecessor,⁸⁹ however, are derived from case law and may have little independent authority.⁹⁰ In fact, R.C.M. 916, rather than defining the substantive scope of special defenses, arguably does no more than reflect a somewhat dated version of the decisional law pertaining to special defenses.⁹¹ Indeed, most Presidential attempts to define substantive law and special defenses in the Manual have been rejected by the Court of Military Appeals as being beyond the executive's authority under the UCMJ.⁹²

Notwithstanding this precedent, because the classification of divestiture as a special defense may affect only a procedural matter (whether the military judge has a sua sponte duty to instruct), the Manual's characterization of the defense could be authoritative.⁹³ Unfortunately, the Manual's classification of divestiture is ambiguous. Although divestiture, as noted, is not included among the special defenses listed in R.C.M. 916, it is expressly called a "special defense" elsewhere in the Manual.⁹⁴ Accordingly, the better approach for classifying divestiture is to examine the underlying theory of the defense to see if it operates as a special defense, rather than to rely upon the Manual's ambiguous characterization.

Virtually every special defense under military law may be classified as being one of three types: 1) justification;

⁸² See generally Milhizer, *Legality of the "Safe-Sex Order" to Soldiers Having AIDS*, *The Army Lawyer*, Dec. 1988, at 4.

⁸³ See *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958).

⁸⁴ A contrary argument is that the victim's conduct and status is relevant to a charge of disobeying a personal order and that the victim's conduct and status is not relevant to other forms of disobedience, such as disobeying a local order. UCMJ art. 92(2). Because of the policy reasons identified in the decisional law, no court has ever made this distinction and it is unlikely that one ever will. See generally *Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958); *Cheeks*, 43 C.M.R. at 1016-17; *Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

⁸⁵ "Special defense" is the military term for "affirmative defense." See R.C.M. 916(a) discussion.

⁸⁶ R.C.M. 920(e)(3); see *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Goins*, 37 C.M.R. 396 (C.M.A. 1967) (military judge or law officer erred by not instructing sua sponte on the special defense of self-defense when it was reasonably raised); see generally *United States v. Steinruch*, 11 M.J. 322, 324 (C.M.A. 1981) (any doubt whether the evidence is sufficient to require an instruction on the defense of agency should be resolved in favor of the accused); *United States v. Symester*, 19 M.J. 503 (A.F.C.M.R. 1984) (generally, the reasonableness of the evidence is irrelevant to the military judge's determination to instruct upon a special defense). It might be argued, however, that the rule requiring the military judge to instruct upon special defenses applies only to those defenses included in R.C.M. 916. Quite to the contrary, the better practice would be to require the military judge to instruct sua sponte based upon the nature of the defense at issue (whether it is a special defense or another defense) and not upon whether it is mentioned in a particular R.C.M.

⁸⁷ See, e.g., *United States v. Boyd*, 17 M.J. 562 (A.F.C.M.R. 1988) (defense must request an instruction on alibi or waive the issue).

⁸⁸ The decisional law prior to *Collier* did not expressly address this issue. Moreover, the reported facts in most cases with members discussing divestiture are generally inadequate to determine whether an instruction was requested or given.

⁸⁹ MCM, 1969, paras. 214 and 216.

⁹⁰ See R.C.M. 916 analysis. In fact, the Manual has changed over time to reflect developments in the decisional authority pertaining to defenses. For example, earlier editions of the Manual required that the accused be endangered personally to be entitled to the duress defense. MCM, 1969, para. 213f. Over time, the decisional law expanded the defense so that it was allowed when persons other than the accused were threatened. See *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976) (threats against the accused's children can raise duress); *United States v. Pinkston*, 39 C.M.R. 261 (C.M.A. 1969); *United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981) (threats against the accused's fiancée and illegitimate child can raise duress). The Manual reflects this case authority, as it provides that duress can be triggered by a sufficient threat to "the accused or another innocent person." R.C.M. 916(h).

⁹¹ For example, *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987), which apparently establishes a special defense of voluntary abandonment for attempt offenses (UCMJ art. 80), was decided after the last change to the Manual for Courts-Martial. Thus, even if the President wanted to recognize voluntary abandonment as a special defense and include it under R.C.M. 916, this could not be accomplished without going through the time and satisfying the administrative requirements needed to change the Manual. The Manual, therefore, cannot be a truly up-to-the-minute reflection of the case authority.

⁹² E.g., *Ellis v. Jacob*, 26 M.J. 90, 92 (C.M.A. 1988); see *supra* note 9.

⁹³ See UCMJ art. 36.

⁹⁴ MCM, 1984, Part IV, para. 13c(5).

2) excuse; 3) or nonexculpatory.⁹⁵ In the case of all defenses based on these theories, the accused does not contest that he or she has factually committed the alleged misconduct. Nevertheless, the accused is not held criminally responsible for other reasons. Other defenses, such as alibi and voluntary intoxication, either negate proof generally or negate special mens rea requirements. An accused who raises one of these defenses denies factual guilt, either in whole or in part.

Tested against this standard, divestiture clearly acts as a special defense. An accused relying on divestiture does not deny committing the charged misconduct, but instead claims that he or she should not be held criminally responsible because of the victim's misconduct. Whether divestiture acts as a justification or an excuse-type of special defense is not entirely clear from the case authority.⁹⁶

Justification defenses are allowed where the harm caused by nominally illegal conduct is "outweighed by the need to avoid an even greater harm or to further a greater societal interest."⁹⁷ Special defenses recognized by military law include self-defense,⁹⁸ defense of others,⁹⁹ and obedience to lawful orders.¹⁰⁰

Excuse defenses, on the other hand, apply where the conduct is illegal, but where it is nonetheless excused

because the surrounding circumstances are such that the actor is not held criminally responsible for his or her conduct.¹⁰¹ Military law also recognizes several special defenses based upon excuse, including mistaken obedience to some unlawful orders,¹⁰² accident,¹⁰³ coercion or duress,¹⁰⁴ inability,¹⁰⁵ ignorance or mistake of fact,¹⁰⁶ and lack of mental responsibility.¹⁰⁷

Divestiture is more accurately classified as an excuse defense rather than as a justification defense. The accused in *Hendrix*, for example, was not *justified* in pushing a commissioned officer who was reading a personal letter belonging to the accused without authority; he was *excused* because of the victim's provocative conduct.¹⁰⁸ Similarly, the accused in *Noriega* was not *justified* in challenging a lieutenant to step outside and fight; he was *excused* because of the lieutenant's overly familiar and inappropriate conduct.¹⁰⁹

The conclusion that divestiture is an excuse defense is supported by the fact that an accused entitled to divestiture may nonetheless be guilty of a lesser included offense.¹¹⁰ If divestiture operated instead as a justification defense, an accused entitled to it would typically be exonerated of all criminal responsibility for his conduct.¹¹¹

Perhaps the most useful way of characterizing divestiture is as a "first cousin" of the partial defense that

⁹⁵ *But see infra* note 106 (mistake of fact may be considered a failure of proof or element negating defense); *but cf.* Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 U.C.L.A. L. Rev. 409 (1981) (lesser evils is neither a justification or an excuse defense, but is a hybrid).

⁹⁶ This distinction can be significant. *See generally* Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95, 103-04 (1988).

⁹⁷ 1 P. Robinson, *Criminal Law Defenses* 83 (1984).

⁹⁸ *See* R.C.M. 916(e).

⁹⁹ *See* R.C.M. 916(e)(5).

¹⁰⁰ *See* R.C.M. 916(d). Other examples of justification defenses include lesser evils/necessity, defense of property, parental discipline, and defense of habitation or premises. *See* 2 P. Robinson, *supra* note 97, at §§ 124, 134, and 135; *see generally* R.C.M. 916(c).

¹⁰¹ 1 P. Robinson, *supra* note 97, at 91.

¹⁰² *See* R.C.M. 916(d).

¹⁰³ *See* R.C.M. 916(f).

¹⁰⁴ *See* R.C.M. 916(h).

¹⁰⁵ *See* R.C.M. 916(i).

¹⁰⁶ *See* R.C.M. 916(j). Mistake of fact has been classified as an excuse defense by some commentators. *See* 1 P. Robinson, *supra* note 97, at § 181. As applied by the military decisional law, the defense can more accurately be viewed as negating an element of the charged offense. *See id.* at § 62; *see generally* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, *The Army Lawyer*, Jan. 1989, at 66.

¹⁰⁷ *See* R.C.M. 916(k). A third major group of special or affirmative defenses are the nonexculpatory defenses. Under these defenses, the actor remains blameworthy but is not punished because of overriding public policy concerns. 1 P. Robinson, *supra* note 97, at §§ 102-04. Examples of nonexculpatory defenses include entrapment, statutes of limitation, and diplomatic and other types of immunity. 2 *id.* at §§ 200-02; *see* R.C.M. 916(g). Divestiture is clearly not a nonexculpatory defense, as an accused entitled to it is not blameworthy for his conduct.

¹⁰⁸ 45 C.M.R. 186 (C.M.A. 1972).

¹⁰⁹ 21 C.M.R. 322 (C.M.A. 1956).

¹¹⁰ *E.g.*, *Richardson*, 7 M.J. at 322.

¹¹¹ Of course, justification defenses may, in some circumstances, also act as only a partial defense. *See, e.g.*, *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983) (victim's escalation of force may have afforded the accused the justification defense of self-defense to the greater offense of aggravated assault, even though the accused was not entitled to self-defense for the initial simple assault which he provoked); *see generally* TJAGSA Practice Note, *Assault and Mutual Affrays*, *The Army Lawyer*, July 1989, at 39.

reduces unpremeditated murder¹¹² to voluntary manslaughter.¹¹³ The concept in voluntary manslaughter that reduces culpability if the accused killed the victim "in the heat of sudden passion caused by adequate provocation"¹¹⁴ is roughly equivalent to the concept in divestiture that allows reduced culpability if the victim's conduct was a "substantial departure from required standards."¹¹⁵ As with divestiture, such sudden heat of passion and reasonable provocation act as only a partial defense to an unlawful killing. In both cases the accused's culpability is reduced, but the accused is not completely excused of all criminal responsibility.

A final matter with respect to divestiture concerns the burdens and standards of production and persuasion. All special defenses, with the exception of lack of mental responsibility,¹¹⁶ follow these same rules. A special defense may be raised at any point during the trial.¹¹⁷ The accused, however, has the burden of raising the defense.¹¹⁸ The defense's burden of going forward does not relieve the government of its burden of persuasion.¹¹⁹ Once the defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defense does not apply.¹²⁰

Having reviewed the origins and development of the divestiture defense as well as examining its currently recognized scope and application, the case of *United States v. Collier* will now be discussed.

United States v. Collier

The accused, a Sergeant (E-5), entered into a highly charged and somewhat profane exchange with his super-

visor and superior, a Chief Warrant Officer Three (CW3).¹²¹ The CW3 testified at the accused's court-martial that, because the confrontation was becoming increasingly loud and heated, he ordered the accused to be at ease.¹²² He said that the order "was given in an attempt to keep the exchange from getting out of hand."¹²³ According to the CW3, the accused "continued the exchange in spite of the repeated order to be at ease."¹²⁴

The CW3 also testified that he did not call the accused an offensive term during the exchange.¹²⁵ The accused's version was markedly different. He testified that the CW3 called him an offensive term and that he was never given an order to be at ease.¹²⁶

The operative facts of the case, as determined by the Army Court of Military Review,¹²⁷ are not specific as to the words directed to the accused by the CW3. The court did observe, however, that "[t]he language used certainly was not the 'parlor or drawing room' language heard in polite society."¹²⁸ Nevertheless, the court characterized the words as being "typical of the language used daily in line units, motor pools and the like by soldiers and their superiors."¹²⁹ The court also found that "inappropriate language was not directed at the [accused] and that he was not called an offensive term by the CW3."¹³⁰ The court concluded that the accused received a lawful order to be at ease from the CW3, who had not abandoned his rank and position. The court therefore affirmed the accused's conviction for disobedience.

One significant aspect of *Collier* is the court's characterization of divestiture as an affirmative or special

¹¹² A violation of UCMJ art. 118(2).

¹¹³ A violation of UCMJ art. 119(1). Of course, the analogy between divestiture and voluntary manslaughter is not complete. For example, words alone may give rise to divestiture but cannot act as an adequate provocation for voluntary manslaughter. See *United States v. Stark*, 19 M.J. 519 (A.C.M.R. 1984).

¹¹⁴ MCM, 1984, Part IV, para. 44c(1)(b).

¹¹⁵ *Id.*, Part IV, para. 13c(5).

¹¹⁶ For the defense of lack of mental responsibility, the defense has the burden of persuasion and the standard is by clear and convincing evidence. R.C.M. 916(k); see *United States v. Massey*, 27 M.J. 371 (C.M.A. 1989).

¹¹⁷ R.C.M. 916(b) discussion provides, in part, that "[a] defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense." See *United States v. Rose*, 28 M.J. 132 (C.M.A. 1989); see generally TJAGSA Practice Note, *Self-Defense Need Not Be Raised by the Accused's Testimony*, *The Army Lawyer*, Aug. 1989, at 40.

¹¹⁸ See *United States v. Hurst*, 40 C.M.R. 681, 682 (A.C.M.R. 1974).

¹¹⁹ See R.C.M. 916(b); see generally *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

¹²⁰ R.C.M. 916(b); *Hurst*, 40 C.M.R. at 682; e.g., *United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967) (government must prove beyond a reasonable doubt that the alleged homicide was not the result of an accident).

¹²¹ *Collier*, 27 M.J. at 809.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 809-10.

¹²⁵ *Id.* at 810.

¹²⁶ *Id.*

¹²⁷ See UCMJ art. 67.

¹²⁸ *Collier*, 27 M.J. at 810.

¹²⁹ *Id.*

¹³⁰ *Id.*

defense.¹³¹ This is the first time that divestiture has been expressly recognized as being such a defense by an appellate military court or board. For the reasons discussed in the preceding section, this characterization is correct. Having found divestiture to be a special defense, the court in *Collier* concluded that the military judge had a sua sponte duty to instruct on the defense if it was reasonably raised.¹³² *Collier*, therefore, puts military judges on notice of their duty to instruct on divestiture where the defense is reasonably raised, even without a request by defense counsel.

A second important issue is whether the victim's conduct constituted divestiture. The first element of the defense—that the conduct and language must be related to the accused—is clearly satisfied. Indeed, the victim's behavior was both in response to and directed at the accused. The second element—that the conduct and language must be viewed under all the circumstances—is recognized by the court in *Collier* and considered by it in its evaluation of the evidence.

The third and final element of divestiture—that the victim substantially departed from the required standards—is the basis for the court's rejection of the defense in *Collier*. The court observed that the CW3's language, although inappropriate in other circumstances, was not unusual in the context in which it was used. Even though the accused might understandably have been offended, the victim in *Collier* did not substantially depart from the required standards of his rank and position. Accordingly, the defense of divestiture was not constituted as a matter of law.

The court's conclusion recognizes the practical realities of military life. The military's mission would be jeopardized significantly and unnecessarily if commanders and supervisors are found to have per se divested themselves of their special status anytime they use profane language or become agitated. Soldiers clearly understand that commissioned officers remain commissioned officers, and that NCOs remain NCOs, even on such occasions. This type of behavior is not generally a substantial departure from the required standards as defined by the decisional law or common sense.

A third important aspect of the court's opinion in *Collier* is troubling. The court's analysis and ultimate rejection of the divestiture defense was undertaken in the context of a disobedience offense. Military authority, however, seems well settled that divestiture is not an available defense for this charge, at least absent extraordinary circumstances. The opinion in *Collier* does not acknowledge this precedent, however, and apparently assumes that divestiture can apply to disobedience in the

same way it applies to disrespect or assault aggravated by the status of the victim.

The precedential import of this aspect of the *Collier* case is problematic. Under one reasonable interpretation, it is doubtful that the court would intentionally depart from precedent and substantially expand the application of the divestiture defense without even acknowledging that precedent. Accordingly, the court's "inadvertent" application of divestiture to a disobedience charge should not be construed as establishing new law. This conclusion finds some support in the fact that the seminal case rejecting divestiture as a defense for disobedience, *United States v. Cheeks*,¹³³ is not even cited in the *Collier* opinion.

A contrary view, which is also reasonable, is that the court intended what it wrote and found that divestiture can apply equally to disobedience charges. The decisional authority that expressly takes a contrary position is by the Air Force Court of Military Review¹³⁴ and is not binding on the Army court. Moreover, as defenses under military law are essentially derived from a "common law" process of decisional authority, the court in *Collier* was not otherwise restricted from expanding the application of the divestiture to other crimes.¹³⁵ Under this view, the court's failure to discuss contrary case authority, while perhaps unwise, does not alter the plain meaning of its decision.

If the latter interpretation of *Collier* is accepted, the implications for trial practitioners are substantial. The government must now consider divestiture when deciding whether to take a potential disobedience case to trial and when preparing to prosecute such a case. Defense counsel must likewise evaluate whether divestiture is available when an accused is charged with disobedience. Counsel must consider raising the defense in a contested case and must ensure that it does not apply if the accused desires to plead guilty. Finally, the military judge must be cognizant of his or her sua sponte duty to instruct on divestiture when the accused is charged with disobedience and the defense is reasonably raised. The judge has a responsibility to resolve any potential divestiture defense when the accused pleads guilty to a disobedience charge.

Conclusion

Divestiture will continue to be an important defense under military law so long as the Armed Forces retain their hierarchical character and protect the rank and position of commissioned officers and NCOs. The decisional law seemed well settled regarding the scope of the divestiture defense and the offenses to which it applied. The recent *Collier* case helps to further refine the

¹³¹ *Id.* at 809.

¹³² *Id.* at 810. The defense counsel in *Collier* did not request an instruction on divestiture.

¹³³ 43 C.M.R. 1013 (A.F.C.M.R. 1971).

¹³⁴ *Id.*

¹³⁵ A few defenses, such as the statute of limitations, are based upon statutory authority. See UCMJ art. 43; see generally *United States v. Jones*, 26 M.J. 650 (A.C.M.R. 1988). Courts, of course, have less flexibility in interpreting and applying such defenses.

definition and elements of divestiture and expressly classifies it as a special defense. *Collier* also injects a new uncertainty with respect to whether the defense applies to disobedience offenses.

Given the frequency of disrespect, disobedience, and assault offenses in the military, all trial practitioners—

counsel and military judges alike—should become familiar with the divestiture defense and the *Collier* case. With the new uncertainty created by *Collier*, trial practitioners now have fertile ground for litigating divestiture issues.

Responsiveness of Unbalanced Bids: Defining a Method of Analysis

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Introduction

Unbalanced bidding refers to the process of submitting bids that contain understated prices for some work and enhanced prices for other work. Unbalanced bids are typically evaluated for responsiveness by application of the Government Accounting Office's (GAO) two-part test.¹ The first aspect of the test, mathematical unbalancing, is a mathematical evaluation of the bid to determine if each element of the bid carries its proportionate share of cost plus profit. The second aspect, material unbalancing, involves evaluating bids found to be mathematically unbalanced to determine if award will result in the lowest cost to the government.

This article examines the evolution of this GAO test and surveys its application in several different procurement situations.² Although the same two-part test is reputedly used to analyze all cases of unbalanced bidding, the test often assumes a substantially different character and can create traps for the unwary contracting officer or legal advisor.

Background and History of the Two-Part Test

Created by the Budget and Accounting Act of 1921,³ the GAO is approaching seventy years of experience with disputes involving government procurements. The GAO's first exposure to unbalanced bidding⁴ took place

in the 1950's, when a Comptroller General opinion discussed the process of "token bidding."⁵ This opinion reviewed a procurement for gloves where a bidder, obviously hoping to buy into a profitable follow-on contract, offered to pay the government \$2.50 for the first ten pair ordered and bid a price of \$00.0000000000000001 each on the next ten pair!⁶

Older GAO decisions reflect a general disregard for unbalanced bidding, but they are inconsistent in both the method of analysis and the justification for taking action. One concern that was consistently expressed was the possibility of fraud or collusion on the part of the bidder. Proof of either fraud or collusion justified rejection of the bid.⁷ Another concern involved Invitations for Bids (IFBs) containing bid evaluation formulas that permitted bidders to bid low on items that they guessed would not be needed. These IFBs violated free and open competition and were cancelled.⁸ A third concern was the potential for a contract administration nightmare over whether or not an underpriced item from a bid was actually required.⁹

With the passage of time, the GAO continued to discountenance poorly drafted bid evaluation formulas and was always vigilant for the possibility of fraud or collusion. At the same time, however, the absence of absolute prohibitions on unbalanced bidding effectively legitimized the process. This problem is reflected in a

¹ Submission of unbalanced bids can also create issues of bidder responsibility or ability to perform. This article, however, is limited to the issue of bid responsiveness.

² This article considers GAO Comptroller General decisions referenced under "Responsiveness of Bids; Unbalanced Bidding" in the Comptroller General Procurement Decisions (CPD) from 1968 to 1988.

³ Ch. 18, § 2, 42 Stat. 20, 20-27 (1921) (current version at 31 U.S.C. § 701 (1982)).

⁴ Although not necessarily described or indexed as unbalanced bidding cases.

⁵ 38 Comp. Gen. 686 (1959).

⁶ *Id.* at 687.

⁷ See 38 Comp. Gen. 572 (1959) (quoting *Frank Stamato and Co. v. City of New Brunswick*, 20 N.J. Super. 340, 90 A.2d 34 (N.J. Super. Ct. App. Div. 1952)).

⁸ 43 Comp. Gen. 159 (1963).

⁹ 47 Comp. Gen. 748 (1968).

1972 Comptroller General decision sustaining the protest of a low bidder who was wrongfully rejected for submission of an unbalanced bid.¹⁰ Noting that there is no prohibition on unprofitable bid prices, the GAO tacitly sanctioned buy-ins by recommending termination for convenience of the awarded contract and re-award to the protestor.¹¹ Absent fraud, collusion, or government fault in designing evaluations that invite speculation, the GAO focus was narrowing, not on whether unbalancing existed, but on whether the government was getting the best price possible. In terms of the two-part test, the second aspect of material unbalancing was the critical issue.

More recent decisions of the Comptroller General reveal a renewed interest in the first aspect of the two-part test—mathematical unbalancing—and indicate a definite movement towards unbalanced bidding prohibitions.

Evolution of the GAO Two-Part Test

The GAO credits development of a mathematical evaluation to determine if a bid is unbalanced to *Armaniaco v. Borough of Cresskill*¹² and *Frank Stamat & Co. v. City of New Brunswick*.¹³ These cases focused on the mathematical aspect of whether each bid item carried its share of the contractor's work and profit or whether the bid was based on underpricing of some items and overpricing of others.

Oswald Brothers Enterprises, Inc.,¹⁴ is credited with recognizing the true two-fold aspects of unbalancing. Noting that a bid may be unbalanced without being nonresponsive, the opinion clarified that the unbalanced bid should not be rejected unless there is substantial doubt that award will result in the lowest cost to the government.¹⁵

The two aspects of the test having been generally defined, it was not until several years later that the test was succinctly stated as presently known.¹⁶ Since then the test, at least in terms of the way it was expressly stated, has remained unchanged.

GAO Application of the Two-Part Test

GAO decisions provide an excellent base of instruction on unbalanced bidding. A review of the applicable GAO decisions reveals that there are a few core cases that are the foundation for other decisions.¹⁷ The following seven cases, reviewed chronologically, are such cases. These cases provide a basis for analysis of many specific procurement situations.

*Matter of Oswald Brothers Enterprises, Inc.*¹⁸

As previously noted, this decision was credited with fully recognizing the mathematical and material aspects of analyzing unbalanced bids for responsiveness.¹⁹ In addition to this noteworthy accomplishment,²⁰ the decision also restates several other consistent GAO positions. These include the critical importance of reasonably accurate government estimates and the acceptability of below cost bid pricing.

Oswald involved an IFB for cleaning, inspection, repairs, and alterations to the North Pumping Station sewer in Newport, Rhode Island. Bidders were required to bid on multiple items of specific work individually, but award was based on total aggregate price. In the event estimated quantities of work varied, contract prices would be computed using item prices bid. *Oswald Brothers* protested award to the overall low bidder, who had obviously stated nominal prices for one item (priced less than 1/100th of other bids and the government estimate) and enhanced prices for others (at least three to four times greater than other bids). Relying on a report that government estimates were reasonable, the opinion denied the protest and held that, despite the existence of a mathematical unbalance, there was not substantial doubt that award to the low bidder would result in the lowest cost to the government.²¹

The *Oswald* opinion does not address the potential for windfall if government estimates are incorrect, nor does it deal with the fact that the low bidder's pricing reflects a firm belief that the estimates are inaccurate. A more critical view of unbalanced bidding by the GAO would have to wait for another day.

¹⁰ 51 Comp. Gen. 792 (1972).

¹¹ *Id.*

¹² 62 N.J. Super. 476, 163 A.2d. 379 (N.J. Super. Ct. App. Div. 1960).

¹³ 20 N.J. Super. 340, 90 A.2d. 34 (N.J. Super. Ct. App. Div. 1952).

¹⁴ Comp. Gen. Dec. B-180676 (9 May 1974), 74-1 CPD ¶ 238.

¹⁵ *Id.*

¹⁶ Comp. Gen. Dec. B-101050 (27 Sept. 1974), 74-2 CPD ¶ 185.

¹⁷ Unlike many judicial or administrative bodies, however, the GAO does not cite consistently to the same decisions. Specifically, a GAO decision is just as likely to cite a more recent opinion that relied on a leading case as it is to cite the original leading case. This might result from lack of historical knowledge on the part of opinion drafters or a confirmation that cases are decided on their own individual facts and not as a result of reliance on binding precedent.

¹⁸ Comp. Gen. Dec. B-180676 (9 May 1974), 74-1 CPD ¶ 238.

¹⁹ Comp. Gen. Dec. B-181050 (27 Sept. 1974), 74-2 CPD ¶ 185.

²⁰ This accomplishment is not obvious from a literal reading of the decision, which references other decisions for the propositions.

²¹ Comp. Gen. Dec. B-180676 (9 May 1974), 74-1 CPD ¶ 238.

Matter of Mobilease Corp. ²²

The Comptroller General's decision in *Mobilease* is frequently cited for its succinct description of the two-fold aspects of unbalancing. This statement of the two-part test for evaluating unbalanced bids for responsiveness has been copied into the text of almost every subsequent GAO case on unbalanced bidding. It is interesting to note that the example of excessive front loaded bidding found in the opinion would not be recognized as an evil by the GAO for almost ten more years. ²³

Mobilease involved an IFB for moveable office buildings for a two-year base period and three additional option years at Lakehurst Naval Air Station, New Jersey. Two of the four bids received in response to the IFB were severely front loaded, with base year pricing more than twenty times greater than prices for the third option period. In addition, neither of the two unbalanced bids decreased until the final option period.

Despite the existence of extreme front loading that was apparent from a breakout of the bids found in the decision, ²⁴ the opinion never discusses this issue. Instead, the case turns on the determination that it was inappropriate for the agency to have evaluated options that would not foreseeably be exercised. Noting that the protestor's bid would be low if the options had not been evaluated, the decision nevertheless recommends no action because the contract was substantially completed.

Subsequent decisions make it fairly certain that the front loading found in *Mobilease* would be grounds for rejection based on the GAO two-part test. ²⁵ In retrospect, the decision in *Mobilease* should be remembered for what it fails to address, rather than for the two-part test it is credited with defining.

Matter of Edward B. Friel, Inc. ²⁶

In a very lengthy opinion the Comptroller General makes one point absolutely clear—sound government estimates are essential to a determination of lowest cost to the government in multiple item requirements-type contracts. This point was not a revelation; earlier cases, including *Oswald*, ²⁷ had relied on the same point when

evaluating mathematically unbalanced bids for material unbalancing. Similarly, prior decisions had already stated that cancellation of a solicitation is appropriate when a solicitation's estimates are not reasonable estimates of actual projected needs. ²⁸

What is enlightening in this opinion is the recognition that reevaluation of bids using estimates other than those provided in the IFB is similar to making an award without allowing the bidders, who might change pricing strategies dependent on estimates, a full opportunity to compete. A logical extension of this statement is that, once the government's confidence in its stated estimates fails, cancellation is the only appropriate action. ²⁹

Friel involved General Service Administration (GSA) IFBs for two, one-year term requirements-type contracts for work related to installation of acoustic ceilings. Bidders were required to submit pricing for performance occurring during government work hours, as well as for performance that would take place during non-government work hours. GSA then applied estimated quantities of work to the prices to determine the low bid. After bid opening, however, GSA determined its estimates were significantly inaccurate and cancelled the IFBs. GSA ultimately developed three sets of estimates, all of which resulted in the same low bidder. As a result, the GSA proposed award to that bidder.

In recommending cancellation of the IFBs, the Comptroller General found that significant variations in the three estimates created substantial doubt that the government would receive the lowest price. This doubt was said to exist if award was made to a mathematically unbalanced bidder or to any bidder. ³⁰

The main point of the *Friel* case—that the government should evaluate using the most accurate estimates available as stated in the IFB—has not always been followed. ³¹ Nevertheless, it remains the most straightforward guidance for dealing with multiple item requirements-type contracts.

Matter of Lear Siegler, Inc. ³²

In *Lear Siegler* the Comptroller General effectively overruled a line of prior decisions and modified applica-

²² Comp. Gen. Dec. B-181050 (27 Sept. 1974), 74-2 CPD ¶ 185.

²³ Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

²⁴ Comp. Gen. Dec. B-181050 (27 Sept. 1974), 74-2 CPD ¶ 185, at 3.

²⁵ See, e.g., Comp. Gen. Dec. B-208795.2, B-209311 (22 April 1983), 83-1 CPD ¶ 438.

²⁶ Comp. Gen. Dec. B-183381 (22 Sept. 1975), 75-2 CPD ¶ 164.

²⁷ Comp. Gen. Dec. B-180676 (9 May 1974), 74-1 CPD ¶ 238.

²⁸ Comp. Gen. Dec. B-159684 (7 Oct. 1966), 66 CPD ¶ 67.

²⁹ The issue of confidence in estimates will almost always be brought to bear in multiple item requirements contracts where unbalanced bids have been received.

³⁰ Comp. Gen. Dec. B-183381 (22 Sept. 1975), 75-2 CPD ¶ 164, at 9.

³¹ See, e.g., Comp. Gen. Dec. B-202966 (24 Nov. 1981), 81-1 CPD ¶ 424, where lack of confidence that estimates would ensure that the mathematically unbalanced apparent low bidder was actually low led to rejection of the low bidder and not cancellation of the IFB. *Id.* See also Comp. Gen. Dec. B-197506 (21 Aug. 1980), 80-2 CPD ¶ 136, where government estimates were determined to be partially incorrect. Finding that the apparent low bidder, who as the incumbent knew of the error, remained low even if the benefit of his knowledge was removed from his bid, award to the low bidder rather than cancellation of the IFB was sustained.

³² Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

tion of the two-part test for evaluation of unbalanced option year contract bids. Prior option year contract decisions focused on the second aspect of unbalancing by asking if options evaluated would be exercised. If the answer was yes, award to the low bidder was proper, without regard to the extent of the mathematical unbalancing.³³

The low bidder in *Lear Siegler* presented a significantly front loaded bid in response to an IFB for motor pool operations at Fort Bragg, North Carolina. The bid covered a base period and three option periods and was easily recognized as mathematically unbalanced, especially in comparison to other bids submitted.³⁴ Despite Army expectations that options would be exercised, the GAO found that the government would assume an inordinate risk of loss. Under the bid, the government would pay the majority of the contract's cost early, but would not get the benefit of the low bid until halfway through the final option period.

The *Lear Siegler* decision, which establishes a per se rule of disqualification for extremely unbalanced option year bids, reflects a renewed interest in closely examining unbalanced bids. Subsequent GAO decisions reveal a similar approach to other unbalanced bidding situations.

*Matter of Applicators, Inc.*³⁵

Applicators is an unusual example of a decision sustaining the protest of a low bidder who was rejected for submitting a bid that was determined to be materially unbalanced by the procuring agency.³⁶ The case involved an IFB for grounds maintenance work along the Baltimore-Washington Parkway for a six-month base period and two, one-year option periods. *Applicators, Inc.*, was the low bidder, but was found to have mathematically unbalanced its bid by front loading equipment costs that should have been allocated over the full term of the contract. A material unbalance was determined to exist in light of the possibility that options would not be exercised.

In reversing the agency's decision, the Comptroller General found that a difference between base and option year pricing of twenty-five to fifty percent does not equate to mathematical unbalancing. This view was supported by a finding that it was appropriate to front load equipment costs for equipment that was suitable for use only in this contract. Finally, the agency's opinion

that options might not be exercised was labeled speculative.

Although a reader might question whether *Applicators, Inc.*, sustained its burden of showing that the rejection was without basis, the case is worth remembering because the opinion emphasizes that deference to agency determinations cannot be assumed.

*Matter of Riverport Industries, Inc.*³⁷

The Comptroller General's decision in *Riverport* breaks new ground in procurements involving first article testing. The opinion's message, however, is consistent with the revised guidance presented in *Lear Siegler*.³⁸

Riverport involved an Army IFB for 38,431 TOW missile overpacks, with two additional units required for first article testing. Five bids were submitted, and award was made to the low bidder, who was subsequently challenged on the basis of material unbalancing. Evaluation of the bids revealed that the low bid had priced the two first article test items at \$185,000.00 each. When compared with first article prices in other bids that ranged from "no charge" to \$1,000.00, substantial front loading of costs was obvious. In fact, the low bidder's pricing would result in payment of more than forty percent of the full contract price for the first article test items. This unbalancing did not pass unnoticed, but, in reliance on prior cases, the Army found that it did not necessarily affect the determinative question of whether the government received the benefit of the lowest price.

In sustaining the protest and rejecting the Army's position, the opinion equated payment under the grossly front loaded bid with making prohibited advance payments, which creates a per se material unbalancing. Later decisions clarify that the underlying concern was to prevent bidders from shifting the risk of loss to the government if first article approval is not granted.³⁹ Subsequent decisions also make it apparent that bid front loading that results in allocation of a percentage of total costs to first article items will be subject to scrutiny and rejection if it is tantamount to allowing advance payments.⁴⁰

Beginning with *Riverport*, the GAO decisions have moved towards an almost per se prohibition on front loaded unbalanced bidding in procurements involving first article test items. The emerging critical nature of the

³³ See Comp. Gen. Dec. B-194760 (9 Aug. 1979), 79-2 CPD ¶ 107; Comp. Gen. Dec. B-196097 (25 Apr. 1980), 80-1 CPD ¶ 298; Comp. Gen. Dec. B-198427.2 (3 Oct. 1980), 82-1 CPD ¶ 289; and Comp. Gen. Dec. B-205611 (7 June 1982), 82-1 CPD ¶ 542.

³⁴ The low bidder's base period price was 282% of its first option year pricing and 340% of its second and third option year pricing.

³⁵ Comp. Gen. Dec. B-215035 (21 June 1984), 84-1 CPD ¶ 656.

³⁶ One element of the research that formed the basis for this article was GAO deference to agency decisions. Evaluated by examining protestor success rates, a survey of over 100 bid responsiveness/unbalanced bidding cases between 1968 and 1988 revealed less than a 20% protest success rate for rejected low bidders. When cases where the government erred by rejecting below cost bids are excluded, this success rate drops almost to zero with *Applicators, Inc.*, the lead case.

³⁷ Comp. Gen. Dec. B-216707 (1 Apr. 1985), 85-1 CPD ¶ 364.

³⁸ Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

³⁹ See Comp. Gen. Dec. B-222476 (24 June 1986), 86-1 CPD ¶ 582; Comp. Gen. Dec. B-228334 (9 Dec. 1987), 87-2 CPD ¶ 572. The same principle is now stated in Fed. Acquisition Reg. 9-305 (3 Oct. 1988).

⁴⁰ *Id.*

two-part test's mathematical aspect in this area has not been subtle. The significance of the change led one protestor, Nebraska Aluminum Castings, Inc., to wage a two-year battle alleging, among other things, inadequate notice of the change.⁴¹ Changes to the Federal Acquisition Regulation have now been proposed that incorporate provisions clarifying this position.⁴²

*Matter of Fidelity Moving & Storage Co.*⁴³

The decision in *Fidelity* makes it clear that disproportionate option year pricing at levels that once would not have been equated with mathematical unbalancing will no longer be shielded from scrutiny. In this sense, *Fidelity* does for the option year contract IFB what *Riverport* did for procurements involving first article test items.

Fidelity involved an IFB issued by the Military District of Washington (MDW) for moving services in several geographic areas for a one-year base period and two, one-year options. Only two bidders presented offers to perform in two of the geographic areas, with one of the bids low in both areas. In response to a protest from the other bidder, the agency rejected the low bidder, *Fidelity*, as materially unbalanced and nonresponsive. *Fidelity* then protested to the GAO.

Relying on GAO precedent, *Fidelity's* strongest argument was that the differentials between its base year and option year pricing (ten to twenty-five percent) precluded a finding of mathematical unbalancing. The Comptroller General acknowledged *Fidelity's* position, but rejected the view that the prior cases were conclusive. Instead, the Comptroller General indicated that the determinative question was whether pricing was reasonably related to the actual costs that would be incurred in each year. Finding that *Fidelity's* bid was mathematically unbalanced, the GAO went on to find material unbalancing where the bid did not decrease until late in the contract term and where there was some doubt whether the options would ever be exercised.

The GAO clarified in *Fidelity* that the assessment for mathematical unbalancing must go beyond differentials to examine the relationship between pricing and actual cost. Coupled with the guidance from *Lear Siegler*⁴⁴ that substantially front loaded bids can be materially unbalanced per se, the treatment of option year bids approaches that of bids involving first article test items.

Overview and Practice Pointers

The Comptroller General noted in a 1981 opinion that the distinctions between mathematical and material unbalancing are actually artificial without a careful review of the factors underlying an unbalanced bid and the effect of its acceptance on the competitive system.⁴⁵ The decisions reviewed above only emphasize the candor of this statement.

What does all of this mean to the practitioner? The contracting officer may be able to recognize an unbalanced bid and may understand the GAO's two-part test. It is unlikely, however, that the contracting officer will appreciate the varying applications of the test. Undoubtedly, the legal advisor's assistance will be indispensable.

As an aid to evaluating unbalanced bids for responsiveness, the following sections cover key points of concern in a variety of unbalanced bidding situations. The situations are described, not by the type of procurement involved, but by the potential underlying motivations that a bidder might have for presenting the unbalanced bid.⁴⁶ An obvious starting point in unbalanced bid analysis is an awareness that the overriding motivation to participants in the bidding process is improved competitive position.

Motive—Submission of a low unbalanced bid to facilitate selection of any of several bid items upon which to base a claim of bid error, dependent upon the price relationship between its bid and that of the next low bidder. This motivation for unbalancing a bid has been the subject of a few protests to the GAO.⁴⁷ It is worthy of mention because an individual familiar with unbalanced bidding will recognize that unprofitable or nominal bidding can be a legitimate exercise of business judgment, but the individual might not see it as a method of manipulating the bidding process. Suspicions that this motivation is present may be heightened should correction of alleged mistakes substantially narrow any price advantage available to the government.

Regardless of the suspected motivations, practitioners cannot specifically address bid unbalances for responsiveness until allegations or suspicions of error are resolved.⁴⁸ Bidders should not be relieved of their burden of submitting clear and convincing evidence of error, the manner in which the error occurred, and the intended bid price.⁴⁹ Corrections that lead to uncertain

⁴¹ Comp. Gen. Dec. B-222476 (24 June 1986), 86-1 CPD ¶ 582; Comp. Gen. Dec. B-222476.2 (23 Sept. 1986), 86-2 CPD ¶ 335; Comp. Gen. Dec. B-223928 (17 Oct. 1986), 86-2 CPD ¶ 463; Comp. Gen. Dec. 222476.6, B-222476.7 (15 Sept. 1987), 87-2 CPD ¶ 249; Comp. Gen. Dec. B-222476.8 (2 Dec. 1987), 87-2 CPD ¶ 533.

⁴² Unbalanced Offers, First Article Test Pricing, 54 Fed. Reg. 4230 (1989).

⁴³ Comp. Gen. Dec. B-222109.2 (21 May 1986), 86-1 CPD ¶ 476.

⁴⁴ Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

⁴⁵ Comp. Gen. Dec. B-202966 (24 Nov. 1981), 81-2 CPD ¶ 424.

⁴⁶ Readers are reminded that this article assumes that unbalanced bids submitted are intended. The very real possibility that unbalancing may result from inexperience with projecting costs or directly reflect an inability to perform are the subject of responsibility determinations not addressed herein.

⁴⁷ See, e.g., Comp. Gen. Dec. B-183546 (7 July 1975), 75-2 CPD ¶ 4.

⁴⁸ A 1955 GAO decision actually involved a low bidder who could not show that he intended his low bid, which the contracting agency suspected was in error. See 35 Comp. Gen. 33 (1955).

bid prices should be disallowed absent clear and convincing evidence that the intended bid would remain low.⁵⁰ Should an unbalance remain after alleged mistakes are resolved, other motivations should be considered.

Motive—Unbalancing a bid using fraud or collusion to guarantee award by a minimal difference, thereby maximizing profit. The frequently cited case of *Frank Stamat & Co. v. City of New Brunswick*⁵¹ states that fraud or collusion has been a suspected motivation for unbalanced bidding for decades. Current emphasis on procurement fraud within the Department of Defense indicates that these concerns are still with us. Suspicions that an unbalanced bid may be motivated by fraud or collusion might be aroused if the low bid is low by a minimal amount, particularly on a large contract. An unbalanced bid that is low and that shows no discernible relationship between pricing and actual costs might alone raise suspicions. Also, patterns of unbalancing between bids should trigger inquiry.

Collusion or fraud might involve government officials or could result entirely from mutual efforts of prospective bidders. Either way, the contracting officer or legal advisor who mechanically applies the GAO two-part test to an unbalanced bid when fraud is suspected is avoiding a duty to report, preserve documents, and coordinate investigation with procurement fraud officials.

Motive—Unbalancing bid prices with a goal of taking advantage of experience with the item or service being procured by drawing profit from items known to be required, OR, unbalancing bid prices to reflect speculation as to actual contract requirements.

These two motivations are very similar and are distinguishable only by the degree of confidence in actual requirements each reflects. Both are clearly based on a disagreement with agency estimates of its requirements. Also, both motivations are likely to be suspected whenever an unbalanced bid is received in response to an IFB for a multiple item requirements-type contract.

The important point for the practitioner to recognize when an unbalanced bid is received in response to a multiple item requirements-type contract IFB is that government estimates are usually being challenged. The

Friel decision discussed above emphasizes that proceeding with application of the GAO two-part test or taking any action short of cancellation of the IFB is contingent upon government confidence in its own estimates, despite these challenges.⁵²

Should confidence in government estimates used for evaluation fail, the practitioner should first consider the impact on competition and should then consider cancellation of the IFB.⁵³ Negative reprourement factors like excessive costs may, however, lead to consideration of other actions sustained by cases subsequent to *Friel*. These include award to the low bidder whose bid remains low despite removing the benefit of any knowledge of error in the government estimates from the bid,⁵⁴ award to the lowest mathematically unbalanced bidder should estimates be found to be inaccurate,⁵⁵ rejection of the substantially unbalanced bid submitted to take advantage of faulty estimates,⁵⁶ or consideration of multiple awards that use the unbalanced pricing offered for the benefit of the government.⁵⁷

Motive—Unbalancing bid prices by front loading option year bids to obtain government financing of equipment requirements, to shift risk of options not being exercised by the government, or to secure advance payments. The GAO decisions in *Lear Siegler*⁵⁸ and *Fidelity*⁵⁹ confirm the fact that evaluation of unbalanced option year bidding, particularly when it results in front loading, is no longer a matter of deciding if option years will be exercised. Instead, evaluation of option year bidding is not complete without an examination of the relationship between pricing structures and actual costs in almost every situation. Fortunately, the mechanics of applying the two-part test for evaluating responsiveness in this area are well defined.

Evaluation of bids involving option years for responsiveness must first include a focus on the mathematical aspect of the two-part test by asking if any unbalancing even exists.⁶⁰ This might be as simple as comparing base and option year pricing of each bid internally and between bidders for differentials. Bids will obviously be ranked in order of overall price, but the point at which a bid becomes low should also be determined.⁶¹ Large differentials in excess of 100 to 200% should be identi-

⁴⁹ 53 Comp. Gen. ¶ 232 (1973).

⁵⁰ Comp. Gen. Dec. B-191209 (29 Aug. 1978), 78-2 CPD ¶ 149. See also Comp. Gen. Dec. B-218610 (2 Oct. 1985), 85-2 CPD ¶ 369.

⁵¹ 20 N.J. Super. 340, 90 A.2d. 34 (N.J. Super. Ct. App. Div. 1952).

⁵² Comp. Gen. Dec. B-183381 (22 Sept. 1975), 75-2 CPD ¶ 164.

⁵³ Passage of the Competition in Contracting Act (CICA), 10 U.S.C. §§ 2301-2306 (Supp. V 1987), could conceivably lead to a renewed preference for this action.

⁵⁴ Comp. Gen. Dec. B-197506 (21 Aug. 1980), 80-2 CPD ¶ 136.

⁵⁵ Comp. Gen. Dec. B-202966 (24 Nov. 1981), 81-2 CPD ¶ 424.

⁵⁶ Comp. Gen. Dec. B-211228 (25 Jan. 1984), 84-1 CPD ¶ 116.

⁵⁷ Comp. Gen. Dec. B-199644 (26 Nov. 1980), 80-2 CPD ¶ 396. Practitioners considering multiple awards should note that their decision should not be motivated by a desire to punish or take unfair advantage of the unbalanced bidder.

⁵⁸ 30 Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

⁵⁹ Comp. Gen. Dec. B-222109.2 (21 May 1986), 86-1 CPD ¶ 476.

⁶⁰ This might be the only evaluation possible if submission of cost data has not been required of bidders.

fied as potential candidates for per se disqualification, especially if they do not become low until the final option period. Bids with smaller differentials of less than fifty or even twenty-five percent cannot be assumed to be mathematically balanced, but must also have their pricing and cost relationships examined.

While the mere existence of base/option year price differentials and front loading might indicate unbalancing, they might not equate to mathematical unbalancing unless they are excessive. Cost of equipment that has little or no value outside contract performance and that is the cause of front loading does not result in mathematical unbalancing.⁶² If front loading instead reflects acquisition costs of equipment that would have value if the contract is terminated, the bid reflects an attempt to obtain government financing and is mathematically unbalanced, because costs should have been allocated over the base and option periods. Similarly, differentials with no discernible relationship to cost are prima facie evidence of mathematical unbalancing.⁶³

Once mathematical unbalancing has been identified, evaluation for material unbalancing and possible rejection for nonresponsiveness must follow. This is a question of whether doubt exists that award under the bid will result in the lowest cost to the government and is a function of three factors: 1) when the bid becomes low and by how much; 2) the significance of base/option year differentials; and 3) the confidence that options will be exercised. The exact mix of these factors that justifies rejection is not absolute. Differentials do not have to be excessive if the bid does not become low until the final option year.⁶⁴ Even great confidence that options will be exercised will not dispel the doubt created by excessive differentials and a bid that becomes low in one of the later option periods.⁶⁵

Practitioners faced with balancing these factors should first assess confidence that options will be exercised. Lack of confidence that options will be exercised might trigger questions as to why options were evaluated at all, but it should result in little question that a mathematically unbalanced bid will not result in the lowest cost to the government.⁶⁶ If we are reasonably confident that options will be exercised, attention should next be directed at what point the bids become low and by how much. A bid that results in little savings to the government and does not become low until well into the final payment period should be rejected. Finally, even if the

bid becomes low before the final option period or presents the potential for substantial savings, large price differentials should be examined to see if they would result in inordinate risk of loss resulting from contract termination being shifted to the government or if they cause payments tantamount to prohibited advance payments.⁶⁷

It is reassuring to note that most GAO decisions, with one notable exception,⁶⁸ reflect some deference to agency determinations on this issue. Conservative practice in a genuine grey area would be to err on the side of the best deal for the government.

Motive—Front loading bids involving first articles to speed recovery of contract costs or to obtain advance payments under the contract. Bids involving first articles are subject to a straightforward rule—pricing that results in payments tantamount to advance payments will not be permitted. This rule finds its basis in federal law prohibiting unauthorized advance payments⁶⁹ and regulatory guidance that contractors must bear the risk that first article approval will not be granted.⁷⁰

Practitioners applying the rule should examine the difference between first article and production item pricing, the percentage of total cost of the contract allocated to first articles, and pricing differences between bids submitted. Inconsistent pricing structures should be examined further to determine if first article pricing is disproportionate to first article value. Specifically, only pre-production and ongoing quality costs for the first articles may be included in the first article price.

Bids that grossly front load first article prices in excess of their value are mathematically unbalanced and per se materially unbalanced. These bids should be rejected even if low. Determining what is "grossly front loaded" remains a judgment call. Previous GAO decisions have found gross front loading when first article pricing accounted for forty percent of total contract cost and when first article prices were fifteen times greater than production item prices.

Practitioners who find themselves in a grey area should consider putting the burden of substantiating first article value on the bidder. Unsubstantiated price differentials could then be weighed against other bids submitted to determine if there was gross front loading. The decision should not be based on the extent of potential

⁶¹ A rank ordering by price can reflect consideration of the time value of money, if it is put into the bid evaluation formula.

⁶² See, e.g., Comp. Gen. Dec. B-211228 (25 Jan. 1984), 84-1 CPD ¶ 116.

⁶³ Comp. Gen. Dec. B-222109.2 (21 May 1986), 86-1 CPD ¶ 476.

⁶⁴ *Id.*

⁶⁵ Comp. Gen. Dec. B-205594.2 (29 June 1982), 82-1 CPD ¶ 632.

⁶⁶ Unless the low bid is low throughout the base and option periods, despite unbalancing.

⁶⁷ The issue of advance payments in option year contracts analysis has not been addressed by the Comptroller General.

⁶⁸ Comp. Gen. Dec. B-215035 (21 June 1984), 84-1 CPD ¶ 656.

⁶⁹ 31 U.S.C. § 529 (1982).

⁷⁰ Fed. Acquisition Reg. 9-305 (3 Oct. 1985).

savings available to the government, although this undoubtedly will be considered.

Motive—Unbalancing to avoid price ceilings or contract award evaluation criteria. GAO decisions reflecting this motivation on the part of bidders have involved construction contracts and multiple item contracts for basic line items with the option of purchasing additional items or accessories.⁷¹ The bidding in these situations has not necessarily involved a disagreement with government estimates, but has been an attempt to circumvent the agency's evaluation formula by bidding low on evaluated items and higher on others.

Understanding the potential motivation to avoid cost ceilings and evaluation criteria is critical for individuals who both develop and apply evaluation criteria. Drafters should know that bid evaluation formulas that encourage submission of unbalanced bids have been found to justify cancellation of an IFB.⁷² Persons evaluating bids for award should realize that failure to examine all price data submitted by a bidder may lead to mechanical application of an evaluation formula that will not result in the identification of the lowest bidder.

Motive—Submission of an unbalanced bid to reflect below cost or nominal pricing in order to ensure award. This motivation is worth mentioning to emphasize two points. First, there is no prohibition on bidding below cost or "buying in." Second, a bid that reflects nominal

pricing for some items but does not reflect enhanced prices for other items is not mathematically unbalanced.⁷³

Practitioners who understand these points will realize that these bids should not be rejected as nonresponsive. The issue of whether the bidder is capable of performing is a separate issue to be resolved.

Conclusion

The most important point for the reader to take from this article is that, despite the ease with which the GAO two-part test can be stated, it is complex in practice and cannot be applied in a vacuum. The test must be used as a backdrop for review of the unbalanced bid itself, the factors underlying the unbalanced bid, and the effect of acceptance of the unbalanced bid on the competitive system.

Determinations involving the responsiveness of unbalanced bidding are certain to present continuing challenges to both contracting officers and legal advisors. The problems they present are not, however, insurmountable. Practitioners who rely on thorough analysis, sound judgment, and awareness of potential changes in GAO perspectives will find that unbalanced bidding need not prevent them from maintaining the integrity of the competitive acquisition process.

⁷¹ See, e.g., 48 Comp. Gen. 34; Comp. Gen. Dec. B-204244 (24 Nov. 1981), 81-2 CPD ¶ 425; Comp. Gen. Dec. B-182754 (18 Feb. 1975), 75-1 CPD ¶ 100; Comp. Gen. Dec. B-227866 (11 Aug. 1987), 87-2 CPD ¶ 151.

⁷² Comp. Gen. Dec. B-180996 (2 Aug. 1974), 74-2 CPD ¶ 73.

⁷³ Comp. Gen. Dec. B-181264 (12 Sept. 1974), 74-2 CPD ¶ 163; Comp. Gen. Dec. B-181470 (6 Nov. 1974), 74-2 CPD ¶ 240; Comp. Gen. Dec. B-201484.3 (21 Dec. 1981), 81-2 CPD ¶ 482; Comp. Gen. Dec. B-208114, B-208880 (20 Oct. 1982), 82-1 CPD ¶ 349; Comp. Gen. Dec. B-223688 (11 Aug. 1986), 86-2 CPD ¶ 177.

Guam Divorces: Fast, Easy, and Dangerous

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Introduction

Sergeant Jones and his wife have not been getting along very well lately. In fact, their marriage has deteriorated to such an extent that divorce seems to be the only answer. This answer poses another problem, however, because Sergeant and Mrs. Jones are stationed

overseas. Neither wants to spend the money to travel back to the United States to initiate legal proceedings. While perusing the TV Guide one evening, Sergeant Jones comes across just the legal advice he was looking for. Right there, in bold print, is an advertisement proclaiming "U.S. divorce in approximately 30 days . . .

*The author is indebted to the Staff Judge Advocate's Office, 43d Combat Support Group (SAC), Guam, and the Navy Legal Services Office, Guam, for providing materials used in researching this article.

no travel needed.”¹ He goes to sleep that night dreaming of being a swinging single again. He does not realize that the nightmare may have just begun.

Tens of thousands of soldiers have been exposed to such advertisements in Europe and in countries in the Pacific. Even people stationed in the United States may be tempted to use Guam courts as a convenient way to get a divorce without waiting six months or longer in the state where they live.

After receiving an information package,² those who pursue the matter eventually obtain a divorce document from an American court.³ Their attorney arranges for a “mutual” or bilateral divorce⁴ from a court in Guam, and the whole matter is handled by mail. Does the client receive a valid divorce or just a worthless and troublesome piece of paper?

The starting point in examining this question is recognition that it takes three parties to make a marriage: a man, a woman, and a government. When love fails, the same three parties have an interest in seeing that the marriage is properly terminated.⁵ The government’s interest is more than just procedural, however. For example, the government has an interest in preserving marriages and families; therefore, it may want to ensure that the parties really desire a divorce before the marital union is dissolved. This concern leads to the requirement in some states that the husband and wife live separate and apart for one, two, or even three years before a divorce can be granted. The government also has an obligation to ensure that children of the marriage are properly provided for, and this concern can be addressed most efficiently in the divorce proceeding itself. Finally, some governmental benefits are based

¹ This quotation is taken from an advertisement in a commercial Armed Forces Network-Germany (AFN) television program guide for April 12, 1989. The guide is distributed free of charge to U.S. Forces personnel in Europe, usually at locations such as installation post exchanges and commissaries. Similar advertisements appear in “weekly shopper” throw-away papers and other commercial materials that are similarly distributed.

The text of the advertisement reads as follows:

U.S. DIVORCES IN APPROXIMATELY 30 DAYS
With Mutual Consent—No Need to Travel—
Law Offices of _____
[Address]
[Telephone Number]

FREE INFORMATION PACKAGES AVAILABLE

Despite the claim of the advertisement, the divorce process may not be as speedy as the client expects. The initial decree will be an interlocutory order. Generally, divorces cannot be finalized until at least six months have elapsed from the date of the interlocutory order. Guam Civil Code §§ 131, 132. Local practitioners report, however, that judges may waive the waiting period.

The ease with which one can obtain a Guam divorce does not necessarily translate into economy. One law firm that specializes in these actions for members of the U.S. forces in Europe requires payment of \$1650.00, payable in full and in advance, to prosecute an uncontested divorce in Guam. The matter is handled entirely by mail, and the client apparently never consults with an attorney in person. The parties fill out a form separation agreement to resolve such matters as property distribution, child custody, support, and other issues.

² These materials may include further reassurance that the divorce will in fact be valid. One firm that specializes in these proceedings sends a form letter that states:

Please beware!

Recently the US. [sic] Immigration and Naturalization Service upheld the ruling that Dominican Republic or Haiti Quickie divorces are invalid for persons not citizens of that country. Many other countries have similarly decided not to recognize Dominican or Haitian divorces.

Since Guam is a US. [sic] territory, a Guam divorce is an American divorce. American divorces are recognized throughout the world. In a Guam divorce, neither party need be an American citizen. A copy of this letter is on file at the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General’s School, Charlottesville, Virginia 22903-1781.

Guam courts are indeed American courts, as the letter states, and decisions of Guam courts that are predicated upon an adequate jurisdictional basis are entitled to recognition in other U.S. courts. See *infra* note 3. To the extent the letter implies that Guam divorces automatically are entitled to recognition by courts in foreign countries, however, it is wrong. Foreign courts may choose to recognize Guam divorces based on the concept of comity, but there is no requirement that they do so.

In preparing this article, the author sent a letter in June 1989 to one of the law firms that advertises the availability of these divorces. The letter explained the legal rationale that draws into question the validity of such divorces and requested a reply to the arguments that are contained herein. No reply was received by the end of January 1990.

³ The primary implication of this statement is that decisions of Guam courts are entitled to full faith and credit. There are no reported cases to substantiate the point, but, as a general proposition, this undoubtedly is true. “Full faith and credit” is provided for in the Constitution (U.S. Const. art. IV, § 1), but the concept is implemented through federal law, as follows:

The . . . judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1982). Guam is an “unincorporated territory of the United States,” (48 U.S.C. § 1421a (1982)), and decisions of its courts therefore fit within the pattern established by section 1738. See also 48 U.S.C. § 1424-2 (Supp. V 1987) (defines the relationship between courts of Guam and other U.S. courts).

Full faith and credit does not automatically attach to every decision by a U.S. court, however. This article explores whether Guam divorces meet the full faith and credit test established by Supreme Court precedent.

⁴ Technically, Guam does not have a provision for “no-fault” divorces. Cf. Guam Civil Code § 92 (listing the grounds for dissolution as adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, and conviction of a felony). It appears, however, that the term “extreme cruelty” is interpreted broadly enough to make a dissolution possible in any uncontested case where one of the spouses is willing to be identified as the defendant.

⁵ See, e.g., *Williams v. North Carolina*, 317 U.S. 287, 297 (1942).

partly on marital status (such as aid to families with dependent children and social security), and unfair provisions in a divorce may increase public costs (e.g., public assistance for impecunious divorcees).⁶ These concerns give the government a vital interest in the divorce proceedings.

If we can agree that the government has interests that need to be addressed in divorce proceedings, the next question is, "Which government?" In the United States, family law is largely left to the states. Accordingly, this question is often framed as, "Which state can grant a divorce?" The U.S. Supreme Court has had occasion to address this issue, both in general terms⁷ and also in a case that specifically involved a divorce decree issued by a territorial court.

Guam's Legislative Authority

The first indication that divorces from Guam are invalid comes from *Granville-Smith v. Granville-Smith*.⁸ In that case the U.S. Supreme Court was asked to rule on a divorce matter that had been before a court of the U.S. Virgin Islands. The local law provided that residence in the Virgin Islands for a continuous period of six weeks created a presumption of domiciliary status for divorce jurisdiction purposes.⁹ Mrs. Granville-Smith filed a divorce petition and testified that she met this requirement.¹⁰ Her husband, who was not in the Virgin Islands, had a local attorney appear on his behalf, deny all of his wife's allegations, and then authorize the court to proceed "as if by default."¹¹ Procedurally, therefore, this was (at least technically) a contested divorce case where both parties had subjected themselves to the court's jurisdiction and the plaintiff had met the statutory test for residency by physical presence in the Virgin Islands for the prescribed period.

The Virgin Islands court refused to grant the divorce, however. It was unsure whether the statutory presumption was a sufficient basis for jurisdiction.¹² Mrs. Granville-Smith appealed this ruling, and the case finally reached the U.S. Supreme Court.

Rather than focusing on the presumption, the Court asked whether Congress granted the Virgin Islands the power to enter divorce decrees in cases such as this. It noted that the legislative power of the Virgin Islands extended to "all rightful subjects of legislation" of "local application."¹³ The Court then found that the Virgin Islands' statutory presumption was designed specifically to allow local courts to grant divorces to nonresidents.¹⁴ Clearly, the law creating the presumption was *not* one of "local application."¹⁵ Just as clearly, its enactment was beyond the authority of the Virgin Islands' legislature. Thus, the law that created jurisdiction was void, and the Court upheld the refusal to grant Mrs. Granville-Smith her divorce.

The *Granville-Smith* decision says little about divorce jurisdiction in general, but it says a great deal about divorce jurisdiction in Guam. Congress has provided that "[t]he legislative power of Guam shall extend to all subjects of legislation of local application."¹⁶ This, of course, is the same statutory formulation that formed the crux of the *Granville-Smith* decision.

Does a Guam statute that confers jurisdiction in a divorce case initiated by a soldier stationed in Germany also constitute legislation that impermissibly has effects beyond "local application?" Later in this article we will see that the Guam legislature specifically has provided that its courts can issue divorces in all uncontested bilateral cases, whether or not either party resides in the territory. Moreover, in such cases neither party has to allege residency status, no evidence need be adduced on

⁶ See, e.g., *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985) (court awarded alimony, partly because the failure to do so would result in the wife becoming a public charge).

⁷ If family law is a matter left to the purview of state legislatures and state courts, one may ask what authority the Supreme Court has in defining jurisdictional limits in divorce cases. The answer lies in the Constitution's full faith and credit clause (U.S. Const. art. IV, § 1). Congress and the federal courts determine the conditions for full faith and credit.

Proper subject matter jurisdiction is one prerequisite for full faith and credit. Thus, full faith and credit cases involving divorces have called upon the Supreme Court to pronounce the minimum jurisdictional requirements for divorce proceedings. A state can ignore Supreme Court determinations in this regard, but it does so at peril that divorces granted by its courts will not be entitled to full faith and credit. As a practical matter, the desire for recognition of judicial acts has led most state legislatures and courts to adhere rather closely to the Supreme Court's jurisdictional rulings.

⁸ 349 U.S. 1 (1955).

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3. While the decision never discusses just where Mrs. Granville-Smith permanently resided, it implies that she took up residence in the Virgin Islands solely for the purpose of obtaining a divorce. Her husband appears to have been residing in New York, a state where divorces were difficult to obtain.

¹¹ *Id.*

¹² The trial court's misgivings were based on the decision of *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), which ruled that the Virgin Islands' statutory presumption was an inadequate foundation for divorce jurisdiction. The *Alton* court held that only true domiciliary status could confer authority to grant a divorce.

¹³ 349 U.S. at 5-6.

¹⁴ The Court quoted statements from Virgin Islands legislators that reflect an interest in promoting tourism as a motive for creating the presumption. *Id.* at 11 n.18. The Court also cited figures suggesting that the tactic was very successful. *Id.* at 13-14.

¹⁵ As the Court noted, people who permanently resided in the Virgin Islands do not need the presumption. They easily can produce evidence that establishes their status as true domiciliaries. *Id.* at 10-11.

¹⁶ 48 U.S.C. § 1423a (1982).

this point, and the court need not make any finding as to residence.

These features of Guam divorce law are highly suspect in light of *Granville-Smith*. Even if Guam has no legislative history that shows the law was fashioned in this way to promote tourism, the absence of a residency requirement can have no purpose other than to allow *nonresidents* to obtain divorces in Guam. As the Court observed in *Granville-Smith*, the territorial residents do not need such a broad jurisdictional grant.

Thus, it seems fair to predict that Guam's law will have the same fate as the Virgin Islands' statute. A statutory scheme that is designed to allow nonresidents to obtain divorces exceeds Guam's legislative authority and is therefore void. Similarly, divorces that are granted under it also should be void, because they were issued by a court that has no jurisdiction.

While this lack of legislative authority may be enough to invalidate Guam divorces granted to nonresidents, it is not the only basis for attacking such decrees. Even if one were to assume that Guam had not exceeded its power to enact laws, there is yet another jurisdictional issue.

The Prerequisites for Divorce Jurisdiction

What is the basic foundation for jurisdiction in divorce cases? The Supreme Court has provided some guidance on this issue in the *Williams*¹⁷ opinions, which involve the following facts. Mr. Hendryx and Mrs. Williams, both of whom were domiciled in North Carolina, travelled to Nevada and resided in a Reno motel for about six weeks. They then obtained divorces from their respective spouses, married each other, and promptly returned to North Carolina where they cohabited as husband and wife. North Carolina authorities refused to recognize the Nevada divorces, however, and they successfully prosecuted the couple for bigamous cohabitation.

In *Williams I* the defendants appealed their convictions, arguing that North Carolina erroneously failed to afford full faith and credit to the Nevada divorce decrees. The Supreme Court observed that a divorce

decree is entitled to full faith and credit if it is issued by a state where one of the parties is domiciled.¹⁸ It further noted that there was no evidence in the record showing that Nevada was *not* the domicile of either of the parties. Thus, on the record that existed at that time, the divorces were valid, and the convictions were reversed.

North Carolina authorities were not happy with this result. They retried the defendants, this time presenting evidence that the couple had not become *bona fide* domiciliaries of Nevada. The state further asserted that, because there was no Nevada domicile, the Nevada decrees were not entitled to full faith and credit. Again the defendants were convicted, and again they appealed.¹⁹

This second conviction required the Supreme Court to directly address the important issue that was sidestepped in *Williams I*: What jurisdictional predicate is necessary for a court to award a divorce? The *Williams II* opinion answered this question by stating the following:

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell v. Bell*, 181 U.S. 175; *Andrews v. Andrews*, 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it.²⁰

The Court ultimately upheld the convictions, a result that rested on the conclusion that the Nevada decrees were not entitled to full faith and credit. Their defect was a lack of subject matter jurisdiction, because the parties were not domiciled in that state.

The Court's statement quoted above has been taken by commentators²¹ and courts²² to mean that domicile of at least one of the parties is the *only* basis for a court's subject matter jurisdiction over divorce proceedings. Not everyone agrees with this proposition, however.²³ For example, the Uniform Marriage and Divorce Act²⁴ and many state laws provide that nondomiciliary members of the armed forces may sue for divorce after military assignment within the state for a

¹⁷ *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*); *Williams v. North Carolina*, 325 U.S. 226, *rehearing denied*, 325 U.S. 895 (1945) (*Williams II*).

¹⁸ The court did not, however, rule in this case that domicile of one of the parties is absolutely *required* for the divorce to be valid. Indeed, it observed that, "Domicile of the plaintiff . . . is recognized . . . as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance." 317 U.S. at 297 (emphasis added and citations omitted). The *Williams II* case clarified the issue, however.

¹⁹ *Williams v. North Carolina*, 325 U.S. 226, *rehearing denied*, 325 U.S. 895 (1945).

²⁰ 325 U.S. at 229. The Court approvingly quoted this language in a later case. See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975).

²¹ *E.g.*, 1 H. Clark, *The Law of Domestic Relations in the United States* 704 (2d ed. 1987). *But see id.* at 717 n.78 (author notes that some authorities dispute this conclusion).

²² *E.g.*, *In re Parks*, 461 N.E.2d 681 (Ill. App. Ct. 1984). See also discussion and cases cited in 1 H. Clark, *supra* note 21, at 722-23.

²³ For a critique questioning whether the rule stated in *Williams II* still is the law and asserting that it should be abandoned, see Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 Tex. L. Rev. 501 (1980). Even Prof. Garfield concedes, however, that legislatures and courts have been extremely reluctant to expand divorce jurisdiction beyond the limits set out by *Williams II*.

²⁴ Unif. Marriage and Divorce Act § 302(a)(1), 9A U.L.A. 181 (1987).

specified period of time.²⁵ Additionally, the *Restatement (Second) of Conflict of Laws* states that substantial contacts with a state that do not arise to the level of domicile can confer subject matter jurisdiction for divorce proceedings.²⁶

Thus, the commentators argue whether *Williams II* establishes domicile as an absolute requirement for divorce jurisdiction. There is no scholarly dispute, however, over the fact that a state must have *some* significant connection with a spouse before it can terminate a marriage.

Does Guam's divorce law comport with this principle? The relevant statute provides as follows.

Residence of parties. A divorce or dissolution of marriage may be granted if one of the parties has been a resident of Guam for at least ninety (90) days immediately preceding the filing of a complaint of divorce, or dissolution of marriage. . . . The parties may conclusively waive any objections which they may have as to the jurisdiction of the court to grant a divorce or dissolution of marriage to either one or both of the parties, which waiver shall conclusively bar any future attack upon the jurisdiction of the court to grant a divorce or dissolution of marriage to the parties pursuant to the provisions of the codes of Guam, and the court shall grant a divorce or dissolution of marriage based upon the consent of the Defendant regardless of whether either of the parties meet any of the foregoing residency requirements, and shall grant a divorce or dissolution of marriage even if neither party is a resident of Guam upon the consent of the Defendant.²⁷

Clearly, Guam allows parties to confer subject matter jurisdiction in divorce cases through consent to the proceedings. In this way, a Guam court can issue a divorce decree that disregards any interests the parties' states of domicile may have in the matter. Just as clearly, this result conflicts with the Supreme Court's pronouncement in *Williams II*. It even fails to meet the more relaxed jurisdictional test espoused in the

Restatement.²⁸ Thus, it seems safe to predict that a Guam divorce granted to parties who are neither domiciled nor resident on Guam is not entitled to full faith and credit.

The Consequences of Migratory Divorce

The term "migratory divorce" (or "transitory divorce") describes situations where neither party is domiciled in the jurisdiction that issues a divorce decree. These cases arise in two contexts. The first is when one of the parties unilaterally seeks a divorce without the other spouse appearing before the court. The second context in which these cases arise is when both parties enter an appearance before the court. Presumably this occurs because they both want a divorce but for some reason they do not want to, or cannot, get a divorce in their state of domicile.

The *Williams* cases exemplify the first context. We have already seen in *Williams II* that such a decree is not entitled to full faith and credit. The divorces may have been effective in Nevada, but they were subject to challenge in any other state. Of course, in the *Williams* cases, the State of North Carolina disputed the validity, but the "divorced" spouse who remained in North Carolina could have done so as well.

In upholding the conviction in *Williams II*, the Court had to confront still another important issue. The Nevada decree included a judicial conclusion that the plaintiffs were domiciled in that state. Was this jurisdictional finding entitled to full faith and credit? The Court ruled that it was not.²⁹ North Carolina (and, presumably, the "divorced" spouse) had the right to collaterally attack this finding because the conclusion was not tested in an adversarial proceeding at the time of divorce. Thus, in a unilateral migratory divorce at least, the divorce court cannot bootstrap its authority by concluding on the record that the necessary jurisdictional facts exist.

To some extent, this part of the discussion is of academic concern with respect to Guam divorces. Guam's current procedures allow migratory divorces

²⁵ Professor Clark observes that these statutes have received uneven treatment by the courts. Some cases have upheld the statutes while others have declared them unconstitutional because they attempt to confer divorce jurisdiction on a basis other than domicile. Still other cases have read the statutes as creating a presumption of domicile that arises after assignment in the state for the specified time period in order to avoid the constitutional issue. 1 H. Clark, *supra* note 21, at 723.

²⁶ Restatement (Second) of Conflict of Laws § 72 (1971). Comment b. to § 72 states the following:
A state may have a sufficient interest in a spouse by reason of some relationship other than domicil, to give the state judicial authority to dissolve the marriage. In the present state of the authorities, few definite statements can be made as to what relationships with a state, other than domicil, will suffice. Residence, as distinguished from domicil, by one of the spouses in the state for a substantial period, such as a year, is an adequate jurisdictional basis for the rendition of a divorce.

No authority was provided to support this observation when it was first published in 1971, and the 1989 pocket part also fails to cite any supporting cases or statutes.

²⁷ Guam Civ. Code § 128, as amended by Pub. L. No. 19-34, § 28 (1988) (effective February 17, 1989).

²⁸ Moreover, when this law is coupled with the local practice of waiving personal appearance of either party in uncontested divorces, Guam courts can become classic divorce mills for people living anywhere in the world. (Materials supplied by the Air Force legal assistance office on Guam state that such appearance waivers are routine; a copy of these materials is on file in the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, Charlottesville, Virginia 22903-1781.)

²⁹ 325 U.S. at 232, 238.

only where both parties consent.³⁰ Thus, we turn now to an examination of the consequences of a migratory divorce in which there is mutual consent of the parties.

In this context, the Supreme Court's *Sherrer*³¹ decision largely has vitiated the most significant effects flowing from *Williams II*. In *Sherrer* the wife travelled from her home in Massachusetts to Florida, ostensibly for a vacation. Once there, she filed for divorce. Her husband personally appeared in the proceedings, apparently to contest the matter, but a divorce was granted nonetheless. The decree stated that Ms. Sherrer was domiciled in Florida, although the issue was not litigated. She remarried soon thereafter, and, within a year of her original departure from Massachusetts, she and her new husband returned to Massachusetts.

Her former husband then challenged the validity of the divorce in a Massachusetts court. He argued that Ms. Sherrer had not in fact adopted a Florida domicile. The Massachusetts court accepted this assertion and refused to recognize the divorce, whereupon Ms. Sherrer appealed the matter to the U.S. Supreme Court, where she won. The Court ruled that

the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.³²

In typical bilateral migratory divorce cases, the *Sherrer* decision effectively nullifies *Williams II*. After all, if

neither spouse can attack the validity of the decree, noncompliance with the Supreme Court's requirements for full faith and credit becomes a moot point.³³ Moreover, the *Sherrer* bar subsequently was extended to third parties, such as children.³⁴ A state probably still could challenge the divorce, but seldom can one expect to find prosecutors so zealous in enforcing criminal cohabitation laws today as they were in the *Williams* cases. With these developments, the domicile rule emanating from *Williams II* has come to be viewed by some as a relic that only impedes efforts to conform the law to today's realities—realities that include a mobile population and universal no-fault divorce.³⁵

Whatever general truth there is to this view, we must remember that the *Sherrer* decision was founded in significant part on the Florida court's explicit finding that Ms. Sherrer had become a domiciliary of that state.³⁶ Indeed, it was precisely this judicial ruling that was entitled to full faith and credit.³⁷ Viewed in this light, Guam Civil Code section 129 becomes very significant. In part, it states that

Allegations and proof of residence or other compliance with the requirements of Section 128 of the Civil Code of Guam need not be plead or proven in any divorce or dissolution of marriage granted upon the consent of the Defendant, and the court need make no findings as to residency of any party to a divorce or dissolution of marriage or as to compliance with the requirements of Section 128 of the Civil Code of Guam in any divorce or dissolution of marriage granted upon the consent of the Defendant.³⁸

This provision allows a Guam court to issue a divorce decree without *any* judicial finding that establishes

³⁰ See *supra* text accompanying note 27. Of course, the issue could arise if a party goes to Guam, resides there for the minimum 90 days before seeking a divorce, and then leaves as soon as the divorce is obtained. The question then becomes whether mere residence for 90 days, maintained expressly to qualify for a divorce, constitute a significant enough connection with the forum to confer subject matter jurisdiction. *Williams II* and the Restatement suggest that it does not.

³¹ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

³² *Id.* at 351. The significant difference between *Williams II* and *Sherrer* is that in the latter case the defendant actually appeared before the court that issued the divorce, while in the *Williams* scenario this did not happen. *Id.* at 349.

³³ Mr. Justice Frankfurter made this point in his dissenting opinion in the *Sherrer* case. 334 U.S. at 356-77.

³⁴ *Johnson v. Muelberger*, 340 U.S. 581 (1951).

³⁵ See generally Garfield, *supra* note 23.

³⁶ *Id.* at 349; 1 H. Clark, *supra* note 21, at 725 n.24.

³⁷ As the Supreme Court framed the issue,

The question with which we are confronted, therefore, is whether such a finding [i.e., that Ms. Sherrer was a domiciliary of Florida] made under the circumstances presented by this case may, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings.

334 U.S. at 349. The key "circumstance of this case" is the fact that the defendant had appeared before the court in the original proceedings.

There is another possible explanation of the *Sherrer* case. The Court made much of the fact that Mr. Sherrer had an opportunity to contest jurisdiction when he appeared before the Florida court (the fact that he did not actually do so was of little consequence). This may suggest that the opportunity to raise the issue is all that is needed to trigger the *Sherrer* rule. Still, one must ask what aspect of the Florida decree served as a bar to the subsequent attack; the answer is the court's specific ruling that Mrs. Sherrer was a Floridian. It was this finding that raised the full faith and credit issue, not the husband's appearance or his opportunity to litigate jurisdiction.

³⁸ Guam Civil Code § 129, as amended by Pub. L. No. 19-34, § 28 (1988) (effective February 17, 1989). See *supra* text accompanying note 27, for a partial text of section 128.

subject matter jurisdiction.³⁹ The omission becomes crucial because it takes the divorce action, which is purely migratory and contrary to *Williams II*, outside the de facto "protection" that *Sherrer* normally provides in such cases. The decree and the parties thus become exposed to the possibility of a later challenge brought by either party or by third parties such as children. The attack would be predicated on the absence of subject matter jurisdiction and would be fully in accord with *Williams II*, both as to substantive law and the denial of full faith and credit.

It may seem unfair that a party could participate in a divorce and then challenge the validity of that very decree at a later date (such as after the other spouse has won a lottery, received a large inheritance, begun drawing retired pay, or died and left a substantial estate). On the other hand, both parties intentionally evaded the law of their domicile, thwarting any interest their home state may have in the matter. This tends to undercut cries of "Foul" from the spouse who wants the divorce to remain valid. Moreover, both parties chose the procedure, presumably with their eyes open to the potential pitfalls, so the spouse who seeks to defend the divorce is in no better position than the one challenging it.

Of course, a court might be inclined to fashion a theory to deny relief for a spouse who seeks to nullify his or her own migratory Guam divorce, notwithstanding the dictates of *Williams II*. The situation is analogous to cases where one party seeks to rescind a bilateral migratory divorce issued by a *foreign* court, and such a divorce was upheld in one case.⁴⁰ Unfortunately for the party seeking to have a Guam divorce affirmed, however, most courts have refused to recognize foreign migratory divorces.⁴¹

Regardless of what courts do with a divorce from Guam, soldiers also must be concerned with how the military will rule on the validity of the judgment. Here, too, the issue can arise in two contexts. If the soldier dies on active duty, substantial sums of cash and other benefits automatically accrue to his or her lawful spouse.

By challenging the Guam divorce, the "former" spouse may attempt to obtain these benefits, even at the expense of the soldier's subsequent marital partner. It is too early to predict what the result would be in such a case, but the Finance Center is likely to look to general principles of American law for guidance in determining who is the spouse. As this article demonstrates, these principles provide ample support for denying the validity of the divorce.

The second context involves basic allowance for quarters (BAQ) at the with-dependents rate. Suppose a soldier obtains a Guam divorce, remarries, and applies for increased BAQ based on the fact that a new spouse exists. Suppose further that the *first* spouse complains to the Finance Center about the soldier's failure to provide support. The complaint cannot be acted upon without an examination of the Guam divorce, and the Army Finance Center has advised that it would treat the second marriage as a "case of doubtful relationship."⁴² This can mean that BAQ will be suspended until the validity of the divorce and the subsequent marriage is resolved by the parties. If the divorce is ruled invalid, BAQ may be terminated (unless the member begins using the money to support the first spouse), and the sum of BAQ already paid to the soldier because of the second marriage could be recouped from his or her pay.

Conclusion

At first glance, the prospect of getting a quick and easy divorce from a court in Guam may sound inviting. The process is fraught with problems, however. Of course, the dangers can be overemphasized, and the majority of people who use this option will experience no difficulties. Nevertheless, if either spouse (or any other interested party) later concludes that the divorce was not advantageous, the legal complications can be extraordinary. The parties will probably end up spending more money and experiencing greater inconveniences than if they had obtained a divorce in their home state in the first place.

³⁹ One of the few reported cases involving a directly analogous situation is *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953). There, the court struck down a Virgin Islands statute that allowed divorce decrees based on the parties' residence for six weeks and their mutual consent. Domicile clearly was not required. Note that the Virgin Islands' residency requirement provided an even stronger basis for exercising jurisdiction than does Guam's law.

Because the Guam statutory provisions have the effect of allowing divorces by mail for anyone, it is instructive to consider the fate of Mexican mail order divorces (noting, of course, that the full faith and credit concept is not applicable in foreign cases). They have not been recognized in the United States, because of their fundamental lack of an adequate jurisdictional relationship between the parties and the forum. See I H. Clark, *supra* note 21, at 729.

⁴⁰ *Rosentel v. Rosentel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), cert. denied, 384 U.S. 971 (1966). This case, however, represents what clearly is the minority position. See Annotation, *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicil in Jurisdiction of the Parties*, 13 A.L.R.3d 1419, 1424, 1439 (1967).

⁴¹ See *supra* note 39; Hemingway, *Foreign Divorces and the Military: Traversing the "You're No Longer Mine" Field*, *The Army Lawyer*, Mar. 1987, at 17.

⁴² See Dep't of Defense, *Military Pay and Allowances—Entitlements Manual*, para. 30233 (1 Jan. 1967).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

It's Not Over 'Til It's Over

Your client has been wrongly convicted and sentenced. "It's over" you tell your client, as he signs the appellate rights form and the guards take him away in handcuffs. Well, not necessarily.

Rule for Courts-Martial 917a specifically says that "the military judge, on motion or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and *before* findings on the general issue of guilt are announced if the evidence is insufficient."¹ In spite of the clear wording of the rule, the Court of Military Appeals has recently reiterated its position that, under certain circumstances, the military judge may also set aside a finding of guilty *after* announcement.²

In *Scaff* the accused was convicted of using cocaine. The defense advanced the theory of unknowing ingestion.³ Despite the defense argument, the military judge returned a finding of guilty and then conducted sentencing proceedings. Approximately two months later, the military judge convened a post-trial article 39a⁴ session pursuant to Rule for Courts-Martial 1102 that was based on newly discovered evidence of unknowing ingestion by the accused.⁵ Defense counsel submitted an affidavit from a witness who alleged that she saw another woman put cocaine in the accused's drink.

The military judge directed the government to provide for the appearance of the civilian witness at a subsequent article 39a session.⁶ Although she was located, the convening authority refused to fund her travel to testify. The Court of Military Appeals held that until the military judge authenticates the record of trial, he may

conduct a post-trial session to consider newly discovered evidence and may set aside findings of guilty and the sentence.⁷ Moreover, the military judge may issue an order for the government to show cause why he should not set aside the findings of guilty and the sentence and order the accused released from confinement pending a new trial.⁸ The convening authority's only recourse would be to direct the trial counsel to move for reconsideration or to initiate a government appeal pursuant to UCMJ article 62.

Counsel should be aware, however, that any motion for reconsideration of findings made after the announcement of findings must be based on legal error, such as jury misconduct, misleading instructions, or legally insufficient evidence.⁹ The Court of Military Appeals has taken the position that, unlike federal district court judges, a military judge is not permitted to set aside a finding of guilty that he considers to be against the *weight* of the evidence.¹⁰ While not a panacea for defense counsel, *Scaff* and *Griffith* stand for the proposition that "it's not over until it's over." CPT Jay S. Eiche.

Glazier: Still Good Law

The admissibility of a stipulation of fact that contains evidence of uncharged misconduct remains far from settled. In *United States v. DeYoung*¹¹ the Court of Military Appeals held that when an admissibility clause is included in the stipulation¹² and the government has not overreached its authority in obtaining the stipulation, the defense counsel's only alternative to stipulating to the uncharged misconduct is to withdraw from the stipulation and any associated pretrial agreement.¹³ In a

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 917a [hereinafter R.C.M.] (emphasis added).

² See *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989); *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988).

³ *Scaff*, 29 M.J. at 61-62.

⁴ Uniform Code of Military Justice art. 39a, 10 U.S.C. § 839a (1982) [hereinafter UCMJ].

⁵ *Scaff*, 29 M.J. at 62.

⁶ *Id.*

⁷ *Scaff*, 29 M.J. at 65.

⁸ *Id.* at 66-67.

⁹ *Griffith*, 27 M.J. at 47.

¹⁰ *Scaff*, 29 M.J. at 65; *Griffith*, 27 M.J. at 48.

¹¹ 29 M.J. 78 (C.M.A. 1989).

¹² The stipulation specifically stated, "It is agreed . . . that the following facts are true, susceptible of proof and admissible without objection. . . ." *DeYoung*, 29 M.J. at 79 (emphasis added).

¹³ *Id.* at 81. The court also held that the military judge must rule on an objection by defense counsel when one is made (see *id.* at 80), thereby suggesting that, if the defense *can* show overreaching, the admissibility provision might be ineffective (*Id.* at 81). One part of the showing is that the facts are clearly inadmissible. See *infra* note 19.

narrowly-worded opinion by Judge Sullivan, the Court of Military Appeals neither overruled *United States v. Glazier*¹⁴ nor addressed the situation in which the stipulation is silent as to admissibility. The parties can still "agree to disagree" by entering into a stipulation, less the admissibility clause, and by litigating the issue at an article 39a session.¹⁵ In such a situation, the trial judge has an obligation to determine: 1) whether the evidence is relevant to prove or disprove a matter set forth by Rule for Courts-Martial 1001(b)(1)-(5);¹⁶ and 2) assuming the evidence is relevant and admissible, whether the prejudicial impact outweighs any probative value.¹⁷

Defense counsel should not acquiesce too easily when the stipulation contains acts that are clearly irrelevant to the charged offenses or that would be inadmissible under evidentiary rules that apply to sentencing.¹⁸ The crux of the Court of Military Appeals' opinion in *DeYoung* was that a stipulation of fact is a negotiated item whereby an accused agrees to stipulate to matters in exchange for favorable concessions from the government. A stipulation may include inadmissible evidence and the parties may expressly agree to waive any objection thereto; however, there is an alternative. The parties may litigate the admissibility of any disputed evidence without violating the terms of the pretrial agreement, provided there is no language in either the stipulation or the agreement that might be construed as a waiver of the issue.

As a practical matter, the sentence limitation is the primary factor in negotiating a pretrial agreement. Defense counsel may be willing to stipulate to evidence that is otherwise inadmissible in exchange for a substantially lower ceiling on punishment. The issue of admissibility may be waived inadvertently if the pretrial agreement contains an automatic cancellation clause that extends to the entire stipulation of fact, rather than to the facts and circumstances immediately surrounding the offense(s). Waiver may also occur if the introductory language of the stipulation states that the parties agree to the admissibility, as well as the truthfulness, of the contents. When negotiating the contents of the stipulation, defense counsel should use Rule for Courts-Martial 1001(b)(1-5) and the applicable evidentiary rules as guidelines to determine relevance and admissibility. If trial counsel

refuses to omit evidence that is clearly improper under any rationale, admissibility must be determined by the military judge, provided the issue has not been waived by the terms of the pretrial agreement or by the stipulation itself. Even in the face of a "boilerplate" waiver clause, a stipulation containing evidence that is inadmissible and irrelevant to any sentencing purpose raises the issue of overreaching by the government.¹⁹

Assuming an accused still desires to enter into the agreement, defense counsel may argue that the waiver was invalid because there was no true negotiation between the parties and because the terms of agreement were presented as a "take it or leave it" proposition. Captain Paula C. Juba.

Use of ADAPCP Participation in Sentencing

Trial defense attorneys occasionally represent an accused who has participated in and failed the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).²⁰ In such cases, that information could be used by the trial counsel in attacking a defense witness's opinion that an accused has rehabilitative potential. When a trial counsel proffers such information, under what circumstances is the evidence admissible? What, if any, effect does the confidential nature of an accused's participation in the ADAPCP have on the disclosure of such information during trial? In the recent case of *United States v. Hanks* the Army Court of Military Review addressed these issues.²¹

Pursuant to his pleas, Specialist Hanks was convicted of conspiracy to distribute marijuana and distribution of marijuana. During the cross-examination of a defense witness in the sentencing phase of trial, the trial counsel challenged the witness's opinion that the accused could be rehabilitated by asking the witness if he was "aware that the accused [had] been through the alcohol education and rehabilitation program" and that the accused was now drinking alcohol again.²² The defense counsel objected on the basis of relevancy. The military judge overruled the objection.

The Army Court of Military Review held that the reference to the accused's participation and subsequent failure in the ADAPCP by trial counsel did not violate

¹⁴ 26 M.J. 268 (C.M.A. 1988).

¹⁵ UCMJ art. 39a; *Glazier*, 26 M.J. at 270, 271. See also *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985), cert. denied, 497 U.S. 917 (1986).

¹⁶ R.C.M. 1001(b)(1)-(5); cf. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989) (it is unnecessary that the evidence offered on the merits fit into enumerated categories (MCM, 1984, Military Rule of Evidence 404(b) [hereinafter Mil. R. Evid.]); sole test is whether evidence is offered for some purpose other than predisposition). See also *Martin*, 20 M.J. at 230 (receipt of sentencing evidence which otherwise meets admissibility tests of evidentiary rules and Manual is not dependent upon character of pleas).

¹⁷ Mil. R. Evid. 403.

¹⁸ See generally *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

¹⁹ "[A]ny prosecutor who, as a consequence of youthful exuberance, prosecutorial zeal, or otherwise, demands and receives the inclusion of clearly inadmissible matter in stipulations of fact . . . faces the possibility of being charged with unethical conduct if he overreaches and forces inadmissible matter to be brought before the court-martial." *United States v. DeYoung*, 27 M.J. 595, 599 n.2 (A.C.M.R. 1988), cited with approval in *DeYoung*, 29 M.J. 81. Presumably, the precatory language could also apply to a prosecutor who insists upon the inclusion of an admissibility clause.

²⁰ See generally Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

²¹ ACMR 8802791 (A.C.M.R. 15 Dec. 1989).

²² *Hanks*, slip op. at 2.

the limited use policy of the ADAPCP,²³ nor did the confidential nature of such participation preclude the government from introducing evidence of the accused's participation in the ADAPCP.²⁴

Rule for Courts-Martial 1001(b)(5)²⁵ allows the trial counsel to offer evidence concerning the accused's previous performance as a service member and potential for rehabilitation.²⁶ The limited use policy provides that certain evidence may not be used against a soldier in actions under the Uniform Code of Military Justice. The limited use policy does not, however, preclude "[t]he introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) first has been introduced by the soldier."²⁷ Section III, chapter 6, AR 600-85, entitled "Release of Personal Client Information," implements federal law²⁸ and prescribes Army policy pertaining to the release of information concerning abusers of alcohol or drugs who are or have been enrolled in the ADAPCP.

The courts previously have addressed the issue of confidentiality of ADAPCP information.²⁹ The cases indicate that the prevailing view is that information of an accused's participation in the ADAPCP can be relevant to the issue of rehabilitation, especially if the accused has had a "relapse." Additionally, the information is admissible for impeachment or rebuttal purposes in cases where the evidence of substance abuse (or lack thereof) first has been introduced by the accused.

While it appears clear that the limited use policy of AR 600-85 allows the introduction of such information under certain circumstances,³⁰ it is not so clear whether the information is protected from disclosure by the confidentiality statute.³¹ In *Hanks* the court ruled that information of participation in the ADAPCP, especially

in light of the fact that the accused had a "relapse," was relevant to the issue of rehabilitation. Accordingly, the court determined that the defense counsel's objection to relevancy was erroneous.³² The court concluded by stating, however, that had the *proper objection* been made at trial, the accused could have asserted his right to confidentiality under the confidentiality statute and section III, chapter 6, AR 600-85. This would have required the trial counsel to then ask the military judge to issue a court order to allow the court to receive and consider the accused's participation in the ADAPCP.³³

To prevent the use of information of participation (and failure) in the ADAPCP by the government during the sentencing phase at trial, the defense should consider limiting its evidence in extenuation and mitigation so as not to introduce evidence of drug or alcohol abuse (or lack thereof). Also, if defense counsel do not ask defense witnesses if they have an opinion as to the accused's potential for rehabilitation, they may be able to keep the door closed on the trial counsel's attempts to impeach the witness with such information. Questions should be limited to the accused's duty performance, character, or whether the witness wishes to serve with the accused or have the accused back in the unit. This should allow beneficial testimony, while limiting the opportunities for the trial counsel to use ADAPCP information against the accused.

If the trial counsel does attempt to introduce the fact that the accused had participated in the ADAPCP, the defense counsel should immediately object. As pointed out in *Hanks*, the objection must be timely and specific or the issue will be waived on appeal.³⁴ While the Army court declined to opine what the proper objection should be, one based on the confidentiality of the information should suffice.³⁵ Even if the information is allowed in

²³ AR 600-85, ch. 6, sec. II.

²⁴ *Hanks*, slip op. at 12.

²⁵ R.C.M. 1001(b)(5).

²⁶ The extent of evidence admissible on rehabilitation has been limited to some extent by the Court of Military Appeals. See *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

²⁷ AR 600-85, para. 6-43(1). The court in *Hanks* noted that "[t]he failure to include 'alcohol abuse' in this paragraph appears inadvertent in light of the provisions of the Limited Use Policy which make reference to incidents of alcohol abuse in each provision. We conclude that if a military accused first introduces evidence of alcohol abuse (or lack thereof), further introduction of evidence for impeachment or rebuttal purposes would then be proper." *Hanks*, slip op. at 5 n.3.

²⁸ 42 U.S.C. § 290dd-3, ee-3 (Supp. V 1987).

²⁹ See *United States v. Gunter*, 29 M.J. 140 (C.M.A. 1989); *United States v. Howes*, 22 M.J. 704 (A.C.M.R. 1986); *United States v. Johnson*, 25 M.J. 517 (A.C.M.R. 1987), *petition denied*, 26 M.J. 226 (C.M.A. 1988); *United States v. Thomas*, 26 M.J. 735 (A.C.M.R. 1988), *petition denied*, 28 M.J. 253 (C.M.A. 1989); *United States v. Fenyo*, 6 M.J. 933 (A.F.C.M.R.), *petition denied*, 7 M.J. 161 (C.M.A. 1979); *United States v. Cruzado-Rodriguez*, 9 M.J. 908 (A.F.C.M.R. 1980), *aff'd*, 14 M.J. 124 (C.M.A. 1982) (summary disposition); *United States v. Evans*, 20 M.J. 504 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 192 (C.M.A. 1986) (summary disposition).

³⁰ *Hanks*, slip op. at 11.

³¹ See *supra* note 28.

³² *Hanks*, slip op. at 11-12.

³³ 42 U.S.C. § 290dd-3(b)(2)(c), ee-3(b)(2)(c), and Public Health Services, Department of Health and Human Services, 42 C.F.R. § 2.65 (1988), outline the contents of records covered by the statute that may be disclosed and provides procedures and criteria for court orders authorizing disclosure.

³⁴ *Hanks*, slip op. at 11.

³⁵ Other grounds for objecting will depend on the circumstances of the case and the conditions under which the trial counsel attempts to introduce such information.

by the military judge, a timely objection by the defense counsel is necessary in order to limit the use of such information by the trial counsel, to force the trial counsel to request a court order (which may be denied) to release the information, and to preserve the issue for appeal. Captain Michael J. Coughlin.

Limited Lesser-Included Offenses to Rape

Your client has been charged with rape. The rape specification is in "short form" and simply alleges that your client did "rape Ms. X."³⁶ At trial, the government's case includes evidence that "Ms. X" is fifteen years old and that your client and several coaccused engaged in sexual intercourse with "Ms. X" while they were all present in the same room. The sole theory of the defense case is that your client's act of sexual intercourse with "Ms. X" was consensual. After your client provides convincing testimony in this regard, the trial counsel attempts to salvage a conviction and requests that the members be instructed on the "lesser-included offenses" of carnal knowledge³⁷ and open and notorious fornication.³⁸ What should you do? The simple answer is: "Object!"

In *United States v. King*³⁹ the Army Court of Military Review addressed this exact issue and reaffirmed the principle that "in [a] short form pleading of rape, it is the second element [by force and without consent] not the first element [sexual intercourse] from which the

lesser-included offenses are carved."⁴⁰ As the Court of Military Appeals has emphasized, "[W]here force is missing but illicit intercourse remains, a *different* crime—such as carnal knowledge, adultery, bigamous cohabitation, or open and notorious fornication—has been committed."⁴¹ Thus, these different crimes must be charged as alternatives if the government wishes to rely on exigencies of proof. These consensual offenses are not lesser-included in rape "unless the added circumstance or element is one which is necessarily encompassed within the specification under which the accused is arraigned."⁴² Without alternative charging or added allegations to a rape specification, an accused charged with rape is not on notice to defend against a consensual sex offense.⁴³

Thus, under the fact scenario in this note, your client was not placed on notice to be prepared to defend against the consensual sex offenses of carnal knowledge and indecent acts in addition to the rape offense specifically charged.⁴⁴ Because the government neither alternatively charged carnal knowledge or indecent acts, nor included language of such offenses within the rape specification (it was the short-form version), such consensual sex offenses are not properly before the court-martial. As in *King*, the government's tardy attempt to salvage a conviction on a non lesser-included offense to rape must fail, and the military judge should refuse the requested instruction. Captain Jeffrey J. Fleming.

³⁶ UCMJ art. 120; see MCM, 1984, Part IV, para. 45f(1).

³⁷ UCMJ art. 120a; see MCM, 1984, Part IV, para. 45b(2).

³⁸ UCMJ art. 134; see MCM, 1984, Part IV, para. 90b; *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983).

³⁹ ACMR 8800746 (A.C.M.R. 12 Dec. 1989).

⁴⁰ *Id.*, slip op. at 4 (citing *United States v. Wilson*, 32 C.M.R. 517 (A.B.R. 1962)).

⁴¹ *United States v. Hickson*, 22 M.J. 146, 154 (C.M.A. 1986) (emphasis added).

⁴² *Id.* at 154 n.11.

⁴³ *King*, slip op. at 4. In addition, an accused would not be permitted to plead guilty to such a consensual offense as it is not lesser-included and therefore has not been referred to trial. See *United States v. Wilkins*, 28 M.J. 992 (A.C.M.R. 1989), *certif. for rev. filed*, 29 M.J. 273 (C.M.A. 1989); *United States v. Cornelius*, 29 M.J. 501 (A.C.M.R. 1989).

⁴⁴ MCM, 1984, Part IV, para. 2b(1). See also *United States v. Serino*, 24 M.J. 848, 850 (A.F.C.M.R. 1987). On the other hand, a nonconsensual indecent act may be a lesser included offense of rape if reasonably raised by the evidence.

Contract Appeals Division—Trial Note

Hindsight—Litigation That Might Have Been Avoided

Captain Rafael Lara, Jr., and
Major Edward J. Kinberg
Trial Attorneys, Contract Appeals Division

This is part of a continuing series of articles discussing ways in which contract litigation may be avoided.¹ The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

Problem

Last year your post awarded a contract for garbage collection on post. The contract was a one-year contract with four, one-year options. Shortly after the contract was awarded it became apparent that the contractor was not performing as well as had been expected, despite the fact that he was complying with the minimum requirements of the contract.

During the course of the year, you attended several meetings during which new specifications for the garbage collection contract were discussed. At most of the meetings the technical people claimed it would take about eighteen months to draft a "perfect" set of specifications, and they stated that the contract should be renewed for the first option year. Consequently, you were not surprised when the contracting officer advised you that he had exercised the option and that the current contract would continue for one more year.

About three weeks after the first option was exercised, you attended yet another garbage meeting. You immediately knew this was not an ordinary meeting because the Director of Contracting (DOC) was present. The DOC opened the meeting by stating that he had just learned that the post had been selected by DA for an experimental recycling project and that DA was going to provide a garbage contractor for the remainder of the year. Consequently, the current contract had to be terminated and he had discovered a way to do so at no cost to the government. He went on to explain that he had promulgated a post regulation several years ago, Post Reg. 900-1, which stated that contract options could not be exercised without the express, written approval of the Director of Contracting.

The DOC claims that he lost track of the contract shortly after award and did not know the option had

been exercised until recently. In any case, he did not give written approval for the exercise of the option. Consequently, he believes the contract is null and void because the contracting officer did not have the authority to exercise the option. He then turns to you with a big smile on his face and says, "Isn't that a great idea?" What do you do?

Solution

Introduction

On the surface, the DOC has presented a valid solution. It is well settled that the government is not bound by acts of its agents that exceed the "bounds" of their authority.² In this case, the post regulation specifically restricted the authority of the contracting officer to exercise the option. Without further analysis, it would be easy to conclude that the post regulation has been violated, that the contracting officer's action was illegal, and that the contract option is void.

Unfortunately, life as a government contract attorney is seldom so easy. You quickly discover that the regulation has never been published, and you are now wondering whether you may use the regulation to void the contract. To determine the answer to this question you need to look at the Administrative Procedures Act³ (APA) and the case law interpreting the Act.

Analysis

The APA states that rules and regulations that effect substantive rights must be published in the Federal Register.⁴ The Supreme Court has specifically endorsed this policy. In *Morton v. Ruiz*⁵ the Court stated that the policy behind the APA was "to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations."⁶ Consequently, each time we apply a regulation to deprive someone of a substantive right we must carefully examine the facts to ensure that the requirements of the APA and the applicable case law have been met.

¹ The concept for this article was based on a research paper prepared by Captain Lara in partial satisfaction of the requirements of the 37th Judge Advocate Officer Graduate Course.

² Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

³ Federal Administrative Procedure Act, 60 Stat. 237 (1947), as amended by 80 Stat. 378 (1966), 81 Stat. 54 (1967), 88 Stat. 1561 (1974) (current version at 5 U.S.C. § 552(a) (1982) [hereinafter APA].

⁴ 5 U.S.C. § 552(a) (1982).

⁵ 415 U.S. 199 (1974).

⁶ *Id.* at 232.

In *New England Tank Industries of New Hampshire*⁷ (NET) appellant was awarded a five-year contract with fifteen, one-year options. The Air Force began a long series of annual renewals in 1965. Each time the option was exercised, the Air Force obligated money from the Air Force Stock Fund.⁸ While stock fund money was not normally available for fuel supply contracts, internal agency regulations prohibiting such funding had been waived. Neither the regulation nor the waiver of the regulation had ever been published in the Federal Register.

In 1973 the Defense Fuel Supply Center (DFSC) took over administration of the contract. DFSC obtained a waiver identical to the Air Force's and continued to pay out of the stock fund. Once again, neither the regulation nor the waiver were published in the Federal Register. Prior to the exercise of the eleventh option, the waiver was withdrawn. As a result, DFSC was required to use Operation and Maintenance (O & M) funds to support future options.⁹ DFSC ignored this new limitation on its authority and obligated funds for the option out of the stock fund.¹⁰

When NET found out (five years later) that the agency had violated its own regulations when it exercised the option, NET filed a claim for an equitable adjustment. NET claimed that the exercise of the option was invalid because the contracting officer did not have the authority to obligate stock funds to support the option and that each of the subsequent years were, in effect, new contracts. Consequently, NET believed it was entitled to a new price for each of the years in question.¹¹ The contracting officer denied the request, and NET appealed to the ASBCA.

The board found that the government was bound by the exercise of the option because the regulation limiting

DFSC's authority had not been published in the Federal Register and there was no evidence the contractor had actual knowledge of the limitation. The board went on to note that the exercise of the option was proper because there was no "legal" limit on the contracting officer's authority to exercise the option and the exercise appeared, in all other respects, to be within the authority of the contracting officer. Consequently, NET was required to comply with the terms of the original contract.

The Court of Appeals for the Federal Circuit reversed and remanded the case to the board to determine whether the unpublished regulation was intended to be a mandatory regulation that was binding upon the government. The court wrote, "To say that the government may escape the consequences of actions knowingly contrary to its agent's authority, by the twin devices of concealing the facts from its contractor and taking care not to publish the authority-denying regulation, smacks too much of a 'heads-I-win-tails-you-lose' approach unworthy of our government."¹² The court specifically stated that a decision should be entered on behalf of NET if the board finds the regulation was intended to bind the government.¹³

The same issue arose in *NI Industries, Inc.*¹⁴ In that case NI submitted a Value Engineering Change Proposal (VECP)¹⁵ that was virtually identical to a proposal previously submitted by another contractor. The contracting officer, relying on an unpublished standing operating procedure (SOP), denied NI's submission because it was not the first in time. When the ASBCA upheld the contracting officer's final decision, NI appealed to the Federal Circuit. In reversing the ASBCA, the court found that the contracting officer had violated the APA by using an unpublished SOP to deny the contractor a substantive right set forth in its contract.¹⁶

⁷ ASBCA No. 26474, 88-1 BCA ¶ 20,395, *vacated and remanded*, 861 F.2d 685 (Fed. Cir. 1988), *reh'g denied*, 865 F.2d 243 (Fed. Cir. 1989).

⁸ Pursuant to 10 U.S.C. § 2208, various working-capital funds, known as "stocks funds," have been established. Each stock fund operates under a charter, prepared by the respective military department or Defense agency, which must be approved by the Assistant Secretary of Defense (Comptroller). Stock funds may be obligated without regard to the fiscal year for which the supplies are to be provided. Consequently, DFSC could, without reservation, obligate funds to exercise the option for the next fiscal year, during the current fiscal year.

⁹ O & M funds cannot be obligated in advance of an appropriation by Congress, which never occurs before the first day of the new fiscal year (and frequently several weeks after the start of the new fiscal year). When an option is exercised for supplies to be provided in the next fiscal year, as in the NET case, the document exercising the option must state that it is conditioned upon the availability of funds.

¹⁰ DFSC violated its instructions because it could not use O & M funds without adding a clause to the contract stating the exercise of the option was subject to availability of funds. Adding such a clause would have breached a contract requirement which stated that the option could only be exercised on the "same terms and conditions" as the original contract. Such a breach would have eliminated the government's ability to exercise the remaining options in the contract.

¹¹ DFSC has advised this office that an underlying item in this matter involves an option to purchase NET's oil storage plant for approximately \$300,000.00 under the original contract. NET claims the plant is now worth approximately \$6,000,000.00. If the government lost its rights when it exercised the option in this case we might not be able to acquire the plant at the option price.

¹² *New England Tank Industries of New Hampshire v. United States*, 861 F.2d 685 (Fed. Cir. 1988), *reh'g denied*, 865 F.2d 243 (Fed. Cir. 1989).

¹³ The Court of Appeals for the Federal Circuit concluded that government officers should not escape the consequences of their unauthorized acts simply because the limitation on the agents authority had not been published in accordance with the APA. The court seems to be saying that government agents are bound by internal rules limiting their authority whether or not such rules have been published in accordance with the APA. Basically, the court held that government agents are required to follow a rule of which they have personal knowledge, whether or not the rule has been published.

¹⁴ *NI Industries, Inc.*, 841 F.2d 1104, 1108 (Fed. Cir. 1988).

¹⁵ Fed. Acquisition Reg. Part 48—Value Engineering (March 2, 1989).

¹⁶ *NI Industries, Inc. v. United States*, 841 F.2d 1104 (Fed. Cir. 1988).

Finally, it is important to note the 1974 decision of the board in *Kurz & Root Co., Inc.*¹⁷ In that case the contracting officer agreed to settle a dispute for \$623,500. The settlement violated an unpublished regulation that required the Chief of the Navy Material Command to approve settlements and contract modifications over \$600,000. The Navy sought to void the settlement on the grounds that the contracting officer did not have authority to enter into the agreement. In denying the government's request, the board stated, "The Navy Procurement Directives are not published in the Federal Register. Had they been there is no question but that we would have had to conclude that any limitation on the contracting officer's authority would have been binding on the Appellant."¹⁸

Discussion

These cases indicate that the DOC's plan will not work. Before you abandon all hope, however, you need to look at the sanctions for failing to publish your post regulation in the Federal Register. The APA states that unpublished rules are not "valid against any person who has not had actual knowledge" of the rule.¹⁹ After reading this, you review the contract once more and discover that you overlooked a clause that states:

The following actions are only effective if the modification setting forth the action is accompanied by a memo, signed by the Director of Contracting, stating that he has reviewed the proposed action and approves issuance of the modification:

- a. Amendments in excess of 15% of the original price of the contract.
- b. The exercise of any options under this contract.

Your discovery should get the post off the hook for the option; that is, the government should be upheld in asserting that the exercise of the option was null and void because it was not approved in accordance with limitations on the contracting officer's authority, of which the contractor had notice. The government has the burden of proving actual notice, but it should have no difficulty doing so; the contract included the requisite notice. While the government will also have to prove that the notice was precise, timely, and informative with respect to the information provided,²⁰ that should be

easily accomplished because the clause was contained in the original solicitation and the subsequent contract.

Conclusion

In the example set out above, it is fairly clear that the regulation involved affected a substantive right of the contractor. The option had been exercised and the government sought to void the contract. In such a case, we can be fairly certain that the board will not allow the government to void the contract in the absence of publication or actual notice.

In other cases the facts may not be so clear. The government is clearly entitled to promulgate internal rules and regulations that govern the conduct of its employees. Nevertheless, not every piece of paper emanating from a department or independent agency is a regulation.²¹ There are many instances in which the courts and boards have held that various policies designed to regulate the internal conduct of government employees do not have to be published.²²

Whenever you are considering applying an internal policy or regulation in a manner adverse to a contractor, you need to determine if the regulation was published in the Federal Register. If not, you next need to determine if the regulation is purely for the internal regulation of the government or if it affects the substantive rights of a contractor. If the regulation or rule effects the substantive rights of a contractor, it may not be enforced absent proof of publication or actual notice.

While the rules discussed above have the potential to severely limit the authority of a contracting officer, they need not do so. You need to ensure that all of your local rules that may impact on the performance of a contract are either published in the Federal Register or are actually included in the contract. If the rules and regulations in issue have not been published, you must ensure that they are listed in the contract and that the contractor signs a statement acknowledging he is aware of all the rules and regulations set out in the contract and has had an opportunity to review each such rule or regulation.

There is no way to guarantee success before the board or courts. Nevertheless, you can substantially improve your chance of success by following the rules discussed above.

¹⁷ ASBCA No. 17146, 74-1 BCA ¶ 10,543, *aff'd*, 227 Ct. Cl. 522 (1981).

¹⁸ *Id.* 74-1 BCA, at 49,942.

¹⁹ See *Merrill*, 332 U.S. 380.

²⁰ *United States v. Anaconda Co.*, 445 F. Supp. 486 (D.D.C. 1977)

²¹ *Piccone v. United States*, 407 F.2d 866, 877 (1969).

²² *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (claims manual); *Blackhawk Heating & Plumbing v. United States*, 622 F.2d 539, 547-48 (Ct. Cl. 1980) (agency reprogramming procedure); *Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138 (exchange service manual); *Electrospace Corporation*, ASBCA No. 14520, 72-1 BCA ¶ 9455 (internal operating procedure). See also *American Optical Corp. v. United States*, 592 F.2d 1149 (Ct. Cl. 1979).

Rate Design Issues

Just as issues in a civil tort case are segregated into issues of liability and issues related to the measure of damages, issues in rate cases also fall into two categories: revenue requirements and rate design. Revenue requirement issues focus on the overall revenue needs of a telecommunication carrier to provide service to all customers. Rate design issues focus on the specific tariff rates and share of overall revenue to be paid by specific customers. In the next decade, rate design issues may dominate litigation in regulatory tribunals.

Contracts between military installations and utilities (communications service agreements or "CSAs") for the regulated services are normally tied to a specific telecommunications tariff. In order to understand the changes toward incentive regulation that have occurred in the last decade, it is important to understand the basic scheme of economic regulation. For many decades, telecommunications regulation set rates that subsidized some customer rate classes. Such pricing was fostered by the goal of developing a national communications network—the concept of "universal service." This goal encouraged the engineering of highly compatible systems by vertically integrated corporations. Prices for services were based on a concept of "value of service," which permitted subsidies, rather than being based on the cost of service. Often there was only one vendor for all telecommunications services.

In the last decade, several changes occurred. New technology drove public policy to move rates closer to costs of service, thereby reducing subsidies among rate classes. One of the three most significant changes in regulatory policy was the deregulation of equipment used on the customer's premises. Second, technology augured a reorganization of the industry's corporate structure to reflect the technological differences in local exchange service and long distance service. Last, changes in technology were making the pricing of local exchange services more sensitive to the cost of providing that specific service. Optic fiber technology and cellular radio competition will have a great future impact on the industry. The historical evolution of telecommunications pricing was discussed in detail in the April 1987 issue of *The Army Lawyer*, at pages 30-31.

Incentive regulation of the telecommunications pricing, which encourages cost reducing innovation, is replacing the traditional return on rate base methods used in the past. It places no limits on the level of return that may be earned, if lower costs are achieved. The new approach prescribes the band of reasonable price levels, which protects both consumers and competitors from unduly predatory pricing tactics. It is similar to the approach to rate regulation that has been applicable to railways and motor carriers. This tends to foster competition and technological innovation. Prices move toward long run incremental costs. Telecommunications carriers can increase overall profits by increasing market shares and reducing costs of service. In August 1987 the Federal Communications Commission (F.C.C.) began a study of "incentive regulation" and some experiments

that have culminated in final rules on "price cap" regulations in a decision in 47 CFR Parts 1, 61 and 65, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC No. 89-91, noticed at 54 Fed. Reg. 19836 (8 May 1989).

Incentive regulation is now affecting the pricing by local exchange carriers (LECs). Technology is giving consumers the opportunity to "by-pass" LECs whose intrastate prices are not competitive. See *Texas Public Utility Commission v. Federal Communications Commission*, 886 F.2d 1325 (D.C. Cir. 1989). The F.C.C. has said "the most significant anticipated rule change in 1990 annual access tariff filings is the possible introduction of price caps for the LEC's." AT&T Tariff FCC No. 16, Competitively Bid Government Services, Public Notice 740, 1989 FCC LEXIS 2801, released January 5, 1990.

State regulators are also moving to adopt this incentive regulation to telecommunications pricing. *Re New England Telephone and Telegraph Company*, 106 PUR4th 1 (MA 1989); *Re Telecommunications Industry Interconnection Arrangements, Open Architecture, and Comparably Efficient Interconnection*, 106 PUR4th 420 (NY 1989); *Re Intellipath II Digital Centrex Service Pricing and Rate Design*, 106 PUR4th 441 (NY 1989); *Re New England Telephone and Telegraph Company*, 106 PUR4th (RI 1989); *Re Centel Network Communications, Inc.*, 105 PUR4th 135 (NV 1989); *Re AT&T Communications of Michigan, Inc.*, 103 PUR4th 400 (MI 1989). These issues are now surfacing in almost every state regulated case. Such regulatory changes may cause a LEC to move away from "value of service" pricing and move rates closer to costs of service.

Computer networks, electronic mail and library facilities, beepers, facsimile telecopiers, and other devices increase the number of services that may be offered by LEC and potential competitors. As state regulators adopt incentive rate making, there is a concern that unprofitable competitive services are not unduly subsidized by monopoly services. The costs of competitive services should be defined as the incremental cost of adding these services to the switched network. This is similar to the concept of incremental pricing of transportation services, which considers the cost of adding an additional carload to a railway train. The minimum revenue from competitive services must recover the added costs that they create. Any revenue recovered over those added costs represents a contribution that would not be available if the competitive services were not offered or properly priced.

This is not an insurmountable regulatory problem. The F.C.C. is regularly called upon to consider whether a proposed tariff rate falls below the lower limit applicable in the F.C.C. price cap band. *In the Matter of AT&T Communications Tariff F.C.C. Nos. 1 and 2; Volume Pricing Plan and Customer Specific Term Plan*, 1989 FCC LEXIS 3012, December 29, 1989. There is a likelihood that the complexity of telecommunications

tariff structures may increase as the pricing of services moves closer to costs of service for each service. Nevertheless, the consumer should benefit by lower prices.

The Regulatory Law Office (JALS-RL) has been working with the Defense Communications Agency (DCA), General Services Administration (GSA), other military departments, and appropriate Army commands

to address innovation in pricing and rate design. Procurement of telecommunications services and rate cases before regulatory commissions will continue to pose challenges and opportunities for the communications officer and his or her lawyer. Concerned personnel at installations are encouraged to report any rate filings made by LECs to the Regulatory Law Office in accordance with Army Regulation 27-40, Legal Services: Litigation, para. 1-4g (4 Dec. 1985).

Clerk of Court Note

What happens when a confinement facility is not informed of the convening authority's action in a prisoner's case? One answer to the question is revealed by a prisoner's letter to his general court-martial convening authority:

On the 26th of April 1989, I was . . . sentenced to . . . 18 months confinement

Sir, since then I have been in confinement for 4 months and 5 days. I am currently spending my sentence at Fort Riley USACA. I am scheduled to appear [sic] in front of the parole board on 15 Sept. Even though I am eligible . . . my parole packet cannot be sent to Washington until [sic] you have signed off on my case. Sir, I have been informed that the J.A.G.C. office here at USACA has sent a letter to you on 12 Aug. requesting information on my case. Unfortunately there has been no reply. I

understand that you are very busy, but this is extremely important to me. . . .

Sir, . . . please send me a reply to my letter . . . [and] explain the finalization of my case and/or if there are any changes in my sentencing. Thank you for your time.

The prisoner's letter was sent on 1 September 1989. The convening authority's action had been taken two months earlier on 29 June 1989, but the confinement facility apparently was not informed.

Postscript: The prisoner's letter was delayed through misrouting in military mail facilities. The convening authority's staff judge advocate apparently did not bother to acknowledge the letter, but merely forwarded it to the Clerk of Court for inclusion with the record as "Receipt of Clemency [sic] Matters After CA's Action."

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Army Court of Military Review Holds That the "Safe-Sex" Order Is Constitutional

The legality of issuing the "safe-sex" order to service members with the AIDS virus has been the subject of much interest and some controversy.¹ In *United States v. Womack*² the Court of Military Appeals held that the

"safe-sex" order did not interfere with the constitutionally-protected private affairs of the accused.³ The conduct at issue in *Womack*, however, was forcible sodomy.⁴ The court observed in this regard that "forcible sodomy is not constitutionally-protected conduct."⁵ Thus, the issue of whether the "safe-sex" order was constitutional when applied to sexual relations that were not otherwise prohibited remained unsettled.⁶

¹ See generally Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, *The Army Lawyer*, Dec. 1988, at 4.

² 29 M.J. 88 (C.M.A. 1989).

³ *Id.* at 91.

⁴ A violation of Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1982) [hereinafter UCMJ]; see generally TJAGSA Practice Note, *Court of Military Appeals Decides AIDS-Related Cases*, *The Army Lawyer*, Dec. 1989, at 32, 33-34.

⁵ *Womack*, 29 M.J. at 91 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The court in *Womack* noted also that constitutional protections generally apply differently in the military because of "its unique mission and need for internal discipline"; consequently "the armed forces may constitutionally prohibit or regulate conduct which might be permissible elsewhere." *Id.*

⁶ For example, private sexual intercourse between unmarried persons. *United States v. Hickson*, 22 M.J. 146, 150 (C.M.A. 1986).

This question was addressed by the Army Court of Military Review less than two months later in *United States v. Sargeant*.⁷ The accused in *Sargeant*, who was unmarried, tested positive for the Human-Immunodeficiency Virus (HIV virus) during mandatory screening tests.⁸ He was thereafter counseled by health-care personnel about the meaning and consequences of being HIV positive, the methods of transmitting the virus, the need to warn prospective sexual partners about his condition, and the requirement that he wear a condom. The accused ignored this counseling and continued to have unwarned and unprotected sex. He was later given a written order by his commander that included both components of the "safe-sex" order (warn partners and wear a condom).⁹ The accused thereafter engaged in unwarned and unprotected sex with two female soldiers on several occasions.¹⁰

After determining that the order had a valid military purpose, the court confronted the accused's argument that the order impermissibly infringed upon his right to privacy. The court acknowledged that the Supreme Court has recognized a right to privacy under the Constitution,¹¹ at least with respect to some activities relating to marriage, procreation, conception, family relationships, child rearing, and education.¹² Despite this right to privacy, the court observed that some regulation of protected conduct was permitted by the Supreme Court to safeguard health, maintain medical standards, and protect life.¹³ The issue, as framed by the court, was whether "the goal of protecting the health and welfare of the unit from the spread of the AIDS virus conflicted in an unconstitutional way with the statutory or constitutional right of the [accused]."¹⁴

The Army court first noted that the Supreme Court has neither expressly recognized nor rejected a constitutional right to engage in consensual, private, heterosexual intercourse. Absent such a holding, the Army court declined to recognize such a right under military law. Moreover, the court held that "there is no constitutional

right to have such sexual intercourse free of reasonable regulation, as here, requiring a servicemember to act prudently to protect the lives of others."¹⁵ The court concluded:

Whatever privacy interest this unmarried soldier had when he engaged in unwarned and unprotected sex with two female soldiers is outweighed by the Army's compelling interest to protect the health and welfare of its personnel and the public especially in light of the scope and danger of the risk involved.¹⁶

The legality of the "safe-sex" order, as applied to otherwise lawful sexual relations, has yet to be decided by the Court of Military Appeals. Given the court's earlier comments in *Womack*¹⁷ and the persuasive opinion by Army court in *Sargeant*, however, the prospect seems clear that the "safe-sex" order will withstand constitutional attacks, at least until the issue reaches the Supreme Court. MAJ Milhizer.

Mens Rea and Bad Check Offenses

Anyone who has ever prosecuted or defended a bad check case knows that they might be swept into a maelstrom of complex legal issues and challenging practical considerations.¹⁸ Among the most demanding aspects of any bad check case is understanding and proving (or disproving, as the case may be) that the accused had the required state of mind for the alleged crime or a lesser included offense. As the recent decision in *United States v. Elizondo*¹⁹ demonstrates, the accused's mens rea will often be the crucial disputed issue in a bad check case.

The accused in *Elizondo* was charged with three specifications of making and uttering worthless checks.²⁰ The evidence showed that the accused was not financially sophisticated. He was paid in cash at his first civilian job.²¹ When he began receiving a paycheck for later civilian employment, he either cashed it at the supermarket or had his wife "take care of it." The

⁷ 29 M.J. 812 (A.C.M.R. 1989).

⁸ *Id.* at 813.

⁹ *Id.* at 813-14. A copy of the written order is included as an appendix to the opinion in *Sargeant*. *Id.* at 818.

¹⁰ *Id.* at 814.

¹¹ *Id.* at 817 (citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)).

¹² *Id.* at 816-17 (and cases cited therein).

¹³ *Id.* at 817 (citing *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); *Roe*, 410 U.S. at 154).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (citing *United States v. Woods*, 27 M.J. 749, 751 (N.M.C.M.R. 1988), *aff'd*, 28 M.J. 318 (C.M.A. 1989) (privacy interest in having unwarned and unprotected sexual intercourse by a service member having the HIV virus is outweighed by the risk of transmission and the resulting potential harm)).

¹⁷ See *supra* note 5.

¹⁸ For an detailed discussion of prosecuting and defending a bad check case, see Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, *The Army Lawyer*, Jan. 1990, at 3.

¹⁹ 29 M.J. 798 (A.C.M.R. 1989).

²⁰ A violation of UCMJ art. 123a.

²¹ *Elizondo*, 29 M.J. at 799.

accused's parents never had a checking account. The accused likewise had no experience with a checking account prior to his enlistment in the Army and his arrival at a unit in Germany. When the accused's first sergeant in Germany threatened him with an administrative discharge if he failed to enroll in the Army Sure Pay system, the accused had his sister open the account in a Texas bank where she worked.

After writing several honored checks, the accused changed his pay option from check-to-unit to direct deposit. Over the subsequent two-month period, the accused wrote forty-eight checks, thirty-six of which were dishonored.²² The various individuals and businesses sent the accused numerous letters notifying him that his checks had been dishonored; the accused eventually redeemed all of the dishonored checks, but none within five days of notification.²³

The court noted several examples of the accused's confusion about the entire checking account process: 1) the accused kept a calendar but threw away the check registers from the bank because they did not have any checks; 2) the cashier had to explain to the accused how to write his first few checks; 3) the accused did not know how to read his bank statement or reconcile his account; 4) the accused tried to balance his checkbook "in [his] head"; 5) the accused would sometimes cash a check and pay in cash rather than simply paying by check; 6) the accused tried to cash and redeem checks with different individuals based upon whether he had received a notice of dishonor from them; and 7) the accused believed that his paycheck, including some back pay, would be deposited in his account before the checks arrived.²⁴ The court also observed that the accused did not receive military pay for several months after the charged incidents because the bank had closed his account. The accused later sought his sister's help and sent her his checkbook. He sold several expensive items he owned and pulled guard duty for other soldiers to raise money to redeem the checks.²⁵ All the checks were redeemed by the accused within a few months.

Based upon this evidence, the court found no intent to defraud or deceive as required by article 123a.²⁶ "Intent to defraud," as defined by the Manual, "means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily."²⁷ The Manual defines "intent to deceive" as being

an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.²⁸

The court concluded that the evidence, rather than establishing either of these distinct special criminal intents,²⁹ instead "reflects a conscientious effort by [the accused] to extricate himself from a situation he did not understand."³⁰

The court also concluded that the evidence was insufficient to sustain the accused's conviction for the lesser included offense of dishonorably failing to maintain sufficient funds.³¹ To be guilty of this offense, the accused must be grossly or culpably negligent with respect to his account.³² "Mere neglect . . . or a simple mathematical error will not suffice. The conduct . . . in [failing to] maintain[] the proper balance . . . must instead amount to bad faith or gross indifference."³³ The court, finding that the accused was no more than simply negligent in maintaining his checking account, concluded that the evidence likewise did not establish a violation of the lesser offense.³⁴

As *Elizondo* makes clear, a bewildered and unsophisticated accused who is simply negligent in maintaining his checking account has not violated article 123a or its lesser included article 134 offense. Counsel involved in a bad check case must be cognizant of the mens rea

²² As the 36 checks were charged in only three specifications, "mega-specs" were necessarily employed. See generally *United States v. Poole*, 24 M.J. 539 (A.C.M.R. 1987), *aff'd*, 26 M.J. 262 (C.M.A. 1988); *Richmond*, *supra* note 18, at 5-6.

²³ For a discussion of the permissive inference of intent to defraud and knowledge created by this notification, see *Richmond*, *supra* note 18, at 7-8. See Manual for Courts-Martial, United States, 1984, Part IV, para. 49c(17) [hereinafter MCM, 1984]; see also *United States v. Cauley*, 12 M.J. 484 (C.M.A. 1982); *United States v. Montara*, 2 M.J. 381 (A.F.C.M.R. 1977).

²⁴ *Elizondo*, 29 M.J. at 799-800.

²⁵ *Id.* at 800.

²⁶ MCM, 1984, Part IV, para. 49b(1)(c) & (2)(c).

²⁷ *Id.*, Part IV, para. 49c(14).

²⁸ *Id.*, Part IV, para. 49c(15).

²⁹ Intent to defraud and intent to deceive are two distinct states of mind. See *United States v. Barnes*, 34 C.M.R. 347 (C.M.A. 1964); *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964); see generally *Richmond*, *supra* note 18, at 4 (explains the distinction between these two intents).

³⁰ *Elizondo*, 29 M.J. at 800.

³¹ A violation of UCMJ art. 134; see MCM, 1984, Part IV, para. 68.

³² MCM, 1984, Part IV, para. 68c; see generally *Richmond*, *supra* note 18, at 4.

³³ *Richmond*, *supra* note 18, at 4 (citing *United States v. Bethea*, 3 M.J. 526 (A.F.C.M.R. 1977); *United States v. Gibson*, 1 M.J. 714 (A.F.C.M.R. 1975)).

³⁴ *Elizondo*, 29 M.J. at 800 (citing *United States v. Brand*, 28 C.M.R. 3 (C.M.A. 1959); *United States v. Hensley*, 26 M.J. 841 (A.C.M.R. 1988)).

requirements for these offenses and the types of evidence and inferences that can establish or contradict these mental states. MAJ Milhizer.

Military Status: Not Necessarily Equivalent to Subject Matter Jurisdiction

In *United States v. Chodara*³⁵ the Army Court of Military Review highlighted an important fact: *Solorio*³⁶ did not put to rest issues of subject matter jurisdiction. *Solorio* held that court-martial jurisdiction depends upon a single factor, "the military status of the accused."³⁷ A cursory reading and application of *Solorio* would seemingly indicate that if military status exists, then subject matter jurisdiction automatically results. As *Chodara* indicates, however, "*Solorio* does not stand for the proposition that subject matter jurisdiction is coterminous with personal jurisdiction."³⁸

In *Chodara* the accused was a reservist who was ordered to active duty for training. On the day after reporting for active duty, the accused underwent a urinalysis. His urine tested positive for benzoylecgonine (BZE), a metabolite of cocaine.³⁹ Expert testimony revealed that BZE is not a natural product of the human body and that no substance other than cocaine produces BZE in the human body.⁴⁰ Based upon the results of the urinalysis, a court-martial convicted the accused of the wrongful use of cocaine. The government argued that jurisdiction existed over the offense because the accused had the metabolite BZE in his body during his period of active duty.⁴¹ At trial, the government expert could offer no conclusions as to when the accused ingested the cocaine or as to when the accused was under the physiological influences of the cocaine.⁴² According to the court, the evidence merely showed that the accused had used cocaine.⁴³ The question relevant to subject matter jurisdiction was: When did the accused use the cocaine? Two inferences were plausible: 1) the accused used the cocaine prior to his active duty; or 2) he used cocaine after coming on active duty. The court reminded the prosecution that it has the burden to prove subject matter jurisdiction.⁴⁴ By not proving that the accused had used the cocaine while subject to the Uniform Code of Military Justice,⁴⁵ the prosecution in *Chodara* failed

to prove that subject matter jurisdiction existed over the offense.⁴⁶

As *Chodara* indicates, personal jurisdiction and subject matter jurisdiction must not be confused. The focus of personal jurisdiction is on the time of trial—is the accused subject to the UCMJ at that time? The focus of subject matter jurisdiction is on the time of the offense—was the accused subject to the UCMJ at the time of the offense?⁴⁷ For offenses committed by soldiers when on active duty (even while in an off-duty status such as leave), the mere status of being in the military will provide a sufficient jurisdiction basis for both personal jurisdiction (assuming no termination of military status) and subject matter jurisdiction. Nevertheless, the distinction between the two types of jurisdiction may be important for offenses that are committed by recruits before coming into the military or, as in *Chodara*, for offenses committed by reservists before coming onto inactive duty training, annual training, or active duty training. Unlike members of the active component, reservists are not subject to the UCMJ at all times. Hence, the government must affirmatively prove that all elements of charged offenses against reservists occurred while the reservist was subject to the UCMJ. *Chodara* should serve as a reminder to military practitioners that regardless of the *Solorio* holding, they should not automatically equate military status to subject matter jurisdiction. MAJ Holland.

Military Rules of Evidence Update

Uncharged Misconduct

When an accused testifies to having never used a particular drug, the cross examiner may rebut the assertion with contradictory evidence. Extrinsic evidence may be used to rebut the statement of no drug use. Nevertheless, Mil. R. Evid. 404(b) prohibits use of one's propensity to commit similar crimes to infer the accused is guilty of the charged crime. The military judge generally is not required to instruct on the proper limited use of the uncharged misconduct absent a request. Mil. R. Evid. 105; *but see* *United States v. McIntosh*, 27 M.J. 204 (C.M.A. 1988) (military judge found to have a *sua sponte* duty to instruct on a very limited permissible

³⁵ ACOMR 8801244 (A.C.M.R. 3 Jan. 1990).

³⁶ *Solorio v. United States*, 483 U.S. 435 (1987).

³⁷ *Id.* at 439.

³⁸ *Chodara*, slip op. at 2.

³⁹ *Id.*

⁴⁰ *Id.* at n.1.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ 10 U.S.C. §§ 801-940 (1982).

⁴⁶ *Chodara*, slip op. at 5.

⁴⁷ *Id.*

use of evidence likely to be misused). Even when an accused opens the door to uncharged misconduct, however, the military judge must decide whether the unfair prejudicial effect of the rebuttal evidence substantially outweighs its probative value. *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Uncharged misconduct is generally admissible to establish an element of the crime, but not propensity. Uncharged misconduct aimed at an issue not in controversy should not be admitted. See *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989); *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). Uncharged misconduct that is offered for a purpose other than propensity need not fit within a specific example listed in Mil. R. Evid. 404(b). *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989) (*res gestae* evidence, although not specifically listed in Mil. R. Evid. 404(b), is admissible when indispensable for a full understanding of the event leading to the specific charge).

Probative Value

Evidence of a willingness to take a urinalysis or polygraph test is of minimal probative value in demonstrating innocence and is generally inadmissible. *United States v. Joyner*, 29 M.J. 209 (C.M.A. 1989). If the accused requests testing and agrees in advance to the unconditional use of the test results regardless of outcome, evidence of the request may be admissible if the government does not comply with the accused's request. See *United States v. West*, 27 M.J. 223 (C.M.A. 1988).

Photographic Evidence

Gruesome photographs must not be admitted if the resulting unfair prejudicial effect would substantially outweigh the probative value of the pictures. If the trauma can be comprehended through accurate drawings or verbal descriptions, the use of gruesome pictures serves little purpose other than their impermissible shock value. When a graphic photograph is needed to demonstrate the degree of force used or the way a crime was committed, a comparison photograph of normal tissue should also be admitted. *United States v. Mobley*, 28 M.J. 1024 (A.F.C.M.R. 1989).

Unavailability

For purposes of introducing a hearsay statement, a declarant is unavailable when AWOL if the government has made a good-faith, but unsuccessful, effort to locate the declarant. *United States v. Wind*, 28 M.J. 381 (C.M.A. 1989). A child victim may be found to be unavailable for purposes of hearsay exceptions if participation in a court-martial would be too traumatic. A child victim is not unavailable solely because the victim's mother felt a conscientious duty to refuse to produce the child to testify. Also, unless the military judge believes a juvenile court's order to the victim not to testify elsewhere supersedes the court-martial's federal subpoena, the juvenile court order alone does not make the victim unavailable. *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989).

Statement Against Penal Interests

When a declarant makes a technically incriminating statement with the expectation of getting a charge

dismissed or a favorable plea bargain, the statement may not be sufficiently against the declarant's interests for admissibility under the Mil. R. Evid. 804(b)(3) hearsay exception. *United States v. Wind*, 28 M.J. 381 (C.M.A. 1989).

Expert Testimony on the Ultimate Issue

While Mil. R. Evid. 704 may permit testimony on an ultimate issue, an expert in drug counseling who interviewed the accused for three hours is not qualified to express an opinion on the ultimate issue of whether the accused is an abuser of drugs. *United States v. Farrar*, 28 M.J. 387 (C.M.A. 1987).

Basis for Expert Opinion

Mil. R. Evid. 703 allows the facts to be presented upon which an expert bases an opinion, even if those facts are otherwise inadmissible. The rule does not permit a party to smuggle hearsay evidence into the case. A good review of these concepts is found at *United States v. Myles*, 29 M.J. 589 (A.F.C.M.R. 1989).

Expert Testimony and Rape-Trauma Syndrome

Testimony by qualified experts concerning rape-trauma syndrome and the observed behavior of an alleged victim may be admissible on the issue of the alleged victim's consent when the expert does not give an opinion as to credibility. *United States v. Peel*, 29 M.J. 235 (C.M.A. 1989); *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).

Relevancy and Credibility

Counsel may not invite court members to infer that an informant's testimony against one must be true because others had been convicted after the informant accused them of crime. The previous case convictions do not establish the truthfulness of the informant's testimony in the present case. Such testimony is irrelevant, misleading, confusing, and unfairly prejudicial, despite the fact that one's track record may show credibility in probable cause determinations. *United States v. Corbett*, 29 M.J. 253 (C.M.A. 1989).

Plea Discussions

Statements made during plea discussions are generally inadmissible if a guilty plea does not result or is ultimately withdrawn. Mil. R. Evid. 410. An accused's spontaneous statement to his commander that he would do whatever it takes to make things right with a larceny victim has been interpreted as a request for an administrative resolution and a part of plea bargain negotiations. As such, the statement was inadmissible against the accused. *United States v. Brabant*, 29 M.J. 259 (C.M.A. 1989); see *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986).

Contradiction and the "Negative" Urinalysis Result

A urine sample containing illegal drug metabolite concentrations below a regulatory cut-off level will be declared negative. If an accused attempts to use such a result to support a claim of no drug use, trial counsel may properly rebut the defense proposition by showing that a "negative" test may indicate some drug use, albeit

below regulatory standards for a "positive" result. The applicable regulations are violated and the accused is denied due process if the trial counsel then affirmatively uses the negative metabolite reading to prove a charged drug use. Trial counsel presenting such rebuttal should ensure limiting instructions strictly confine consideration of the evidence to fair rebuttal. *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989). MAJ Warner.

Use of an Unlawfully Obtained Prior Inconsistent Statement for Impeachment Purposes

May a statement elicited in violation of one's sixth amendment right to counsel be used to impeach the declarant? Neither the U.S. Supreme Court nor the Court of Military Appeals has decided this issue, but the District of Columbia Court of Appeals allowed the use of such a statement in a recent case.⁴⁸ The opinion balances the importance of deterring similar constitutional violations with the need for truth in judicial proceedings.

Martinez, a murder suspect, invoked his right to counsel after receiving rights warnings. Later, while filling out an arrest report, a detective asked Martinez whether he wanted to include his version of the facts in the report. Martinez declined at first and then changed his mind. Martinez claimed he answered a knock on the door, took a knife from an assailant who tried to stab him, and stabbed the assailant. The victim then fell out of a window to his death. At trial on a murder charge, Martinez related a somewhat different story. Martinez and the victim had been dancing, the victim touched Martinez in an offensive manner, and Martinez hit the victim. When the victim came at Martinez with a knife, Martinez knocked the knife away and stabbed the victim.

The trial court found the first statement to be voluntary but elicited in violation of the defendant's sixth amendment right to counsel.⁴⁹ Nevertheless, the trial court found the prior inconsistent statement could be used for impeachment purposes. The appellate court affirmed saying the defendant should not be shielded from "contradiction of his own untruths," thereby permitting a "resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."⁵⁰ The appellate court noted that prior inconsistent statements have been held admissible for impeachment purposes despite being elicited in violation of fourth and fifth amendment rights.⁵¹

In balancing the competing policies, the D.C. Court of Appeals noted that the testimony differed from the previous statement only as to what preceded the stabbing. The admission of the illegally obtained inconsistent

statement did not interfere with the self-defense theory, but it gave the jury important information from which to judge the defendant's credibility. Introduction of the inconsistent statement served the important truth-seeking function to a greater degree than suppression would have deterred similar conduct in the future, and, as a result, the inconsistent statement could be used for impeachment.

While this development is important, the issue is not settled in the military or in the federal circuits. The D.C. Court of Appeals has given advocates guidelines on the factors to be balanced. Legal advisors should continue to caution against any attempts to elicit a statement once a suspect requests counsel. If a government agent resorts to duress, coercion, abusive tactics, or other egregious, overbearing conduct,⁵² to include a purposeful disregard of the suspect's right to counsel, the balancing will shift to suppression of the statement obtained. MAJ Warner.

New Trial and Defense Counsel Handbook Published

Criminal Law Division, TJAGSA, has recently published a TJAGSA text (JA 310), entitled *Trial Counsel & Defense Counsel Handbook* (1 Feb. 1990). JA 310 replaces Dep't of Army, Pam 27-10, Military Justice Handbook for the Trial and the Defense Counsel (Oct. 1982). JA 310 provides detailed procedures for both trial and defense counsel, sample forms and formats for court-martial practice, and a trial manual with sample courtroom dialogues.

JA 310 soon will be distributed to judge advocate offices worldwide. Copies will be issued to basic and graduate course students at TJAGSA and will be made available through the Defense Technical Information Center (DTIC). Information on how to obtain copies from DTIC can be obtained from the "Current Materials of Interest" section of *The Army Lawyer*.

Contract Law Note

New Demands for Individual Sureties

Two recent developments in regulatory and decisional law have made the requirements for qualification of individual sureties more stringent.

New Individual Surety Provisions

The first development is the recent promulgation of new Federal Acquisition Regulation (FAR) provisions, which took effect on 26 February 1990. The provisions have substantially changed the rules governing use of individual sureties.⁵³ The following are among the changes in FAR surety provisions.

⁴⁸ *Martinez v. United States*, D.C. Ct. App. No. 85-1085 (Nov. 21, 1989). Judge Mack would have reversed on the grounds that the statement was erroneously admitted in violation of the sixth amendment right to counsel, citing *U.S. v. Brown*, 699 F.2d 585 (2d Cir. 1983).

⁴⁹ *Id.* (citing *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975)).

⁵⁰ *Id.* (citing *Walder v. United States*, 347 U.S. 62, 65 (1954) (a similar fourth amendment case)).

⁵¹ *Id.* (citing *Walder*; *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975)).

⁵² *Id.*

⁵³ Fed. Acquisition Cir. 54-53 (28 Nov. 1989); 54 Fed. Reg. 48980 (1989).

Prior to the changes, two individual sureties were required on a bid guarantee, performance bond, or payment bond, and each of the sureties had to have a net worth equal to or exceeding the penal amount of the bond.⁵⁴ Now, however, only one individual surety, or up to three individual sureties whose combined net worth equals or exceeds the amount of the bond, will be required.⁵⁵

Each proposed individual surety is still required to list his or her assets, liabilities, and net worth on Standard Form (SF) 28, Affidavit of Individual Surety.⁵⁶ Hereafter, an individual surety is acceptable only if the surety also submits a pledge of security interest in assets equal to the bond's penal amount.⁵⁷ An escrow account with a federally insured financial institution, a lien on real property, or a combination of both, may be pledged in the name of the contracting agency as assets supporting a bond.⁵⁸

Assets that can be placed in escrow to secure the government's interests can include cash or cash equivalents, U.S. Government securities, stocks and bonds actively traded on a national U.S. security exchange, real property owned in fee simple, and irrevocable letters of credit issued by a federally insured financial institution. To pledge real estate, a surety will be required to furnish a lien recorded in favor of the government that is supported by evidence of title. To pledge assets other than real estate, the assets will have to be placed in an escrow account. Guidelines on the acceptability and handling of assets are set forth in the new FAR provisions.⁵⁹

Release of the government's security interest in an individual surety's assets is an important element of the new requirement that a surety grant a security interest to the government in support of a penal bond. Security interests shall be maintained for a specified period following final payment,⁶⁰ unless the contracting officer releases the security interest at the request of the surety. The government's security interest in assets held in escrow or in real property can be released early if an offer supported by a bid guarantee will not result in award of a contract⁶¹ or the contractor's obligations

under a performance bond have been substantially performed.⁶²

To effectuate these new requirements, a new FAR clause that requires offerors to obtain pledges of assets from individual sureties is prescribed for inclusion in any solicitation or contract that requires the submission of bid guarantees, performance bonds, or payment bonds.⁶³

Finally, the FAR now provides that individuals and government contractors may be ineligible to act as individual sureties. First, FAR provisions governing sureties have been revised to provide that an individual may be excluded from acting as a surety on bonds submitted by an offeror on a federal procurement if such an exclusion is necessary to protect the interests of the government.⁶⁴ Such exclusions shall be imposed utilizing FAR debarment, suspension, and ineligibility procedures.⁶⁵ Additionally, Subpart 9.4 of the FAR has been expanded to provide specifically that any contractor that has been debarred, suspended, or proposed for debarment is precluded from acting as an individual surety.⁶⁶

CPA Certification of Financial Statements

The second development regarding sureties concerns the degree to which the government may require verification of financial information submitted by an individual surety. If a contractor proposes to have individual sureties provide performance and payment bonds required by a solicitation, can the government require the contractor to provide financial statements (balance sheets and income statements) that have been certified by a Certified Public Accountant (CPA)? The General Accounting Office recently addressed this question in *Consolidated Industrial Skills Corporation*,⁶⁷ which concerned a request for proposals issued by the Navy for base maintenance and utilities operations. A contractor protested a solicitation provision that required offerors using individual sureties to submit a CPA's audited financial statement as evidence of each individual surety's net worth. The protester contended that the requirement for audited financial statements was unduly restrictive of competition because it was so onerous that

⁵⁴ FAR 28.202-2(a) (superseded 26 Feb. 1990). See *supra* note 53.

⁵⁵ FAR 28.203(b).

⁵⁶ FAR 28.203(b); FAR 53.301-28 (Standard Form 28).

⁵⁷ FAR 28.203-1(a).

⁵⁸ FAR 28.203-1(b).

⁵⁹ FAR 28.203-2; FAR 28.203-3.

⁶⁰ FAR 28.203-5(a).

⁶¹ FAR 28.203-5(b).

⁶² FAR 28.203-5(c).

⁶³ FAR 28.203-6; FAR 52.228-11.

⁶⁴ FAR 28.203-7.

⁶⁵ FAR, subpart 9.4.

⁶⁶ FAR 9.405(c).

⁶⁷ Comp. Gen. Dec. B-236239.2 (6 Oct. 1989), 89-2 CPD ¶ 328.

it effectively eliminated the availability of individual sureties as a source of bonds.

In support of its position, the protester submitted evidence from two CPAs that they never prepare audited personal financial statements, but that they often prepare compiled personal financial statements for potential individual sureties. The GAO considered the distinction between the two types of statements to be essential. A CPA personally verifies or attests to information in an "audited" statement, whereas a "compiled" statement contains only the unverified information submitted by the individual surety. The GAO also considered evidence presented by the contracting officer that persons who sign Standard Form (SF) 28, Affidavit of Individual Surety,⁶⁸ often do not understand what they are signing and do not have personal knowledge of the surety's net worth. The GAO noted that the contracting officer is obligated to determine the acceptability of individual sureties⁶⁹ and that the contracting officer is not limited to considering just the information submitted on the SF 28.⁷⁰

In reaching its decision, the GAO relied on the wide degree of discretion afforded to the contracting officer in determining the suitability of sureties and on its finding that "compiled" financial statements are of limited value in determining a surety's net worth, whereas "audited" statements provide independent verification of information about a surety. The GAO's rationale can most readily be discerned from the opinion's pronouncement that "when one decides to engage in the business of being an individual surety—and it is a business—one should be prepared to provide an independent verification of the net worth claimed."⁷¹ Thus, the Comptroller General found that requiring CPA-audited financial statements of potential sureties is reasonable and is not an unduly restrictive solicitation requirement. MAJ Murphy.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Notes

Refund Programs for Soldiers Deployed on Operation Just Cause

The recent success of the SJA's office at Fort Ord in seeking refunds for soldiers deployed on Operation Just

Cause is instructional for all legal assistance attorneys. The following reports from the Fort Ord SJA office discuss actions taken to minimize losses to soldiers whose leave plans were altered by the deployment to Panama. The reports describe two basic situations commonly occurring during such a deployment. The first report deals with recovering expenses incurred by soldiers who had to cut short their leaves and return to Fort Ord for the deployment. The second report details actions the Fort Ord JAG office took to obtain refunds of airline and other tickets that soldiers were unable to use because of the deployment. Together, the reports illustrate the effectiveness of teamwork, initiative, and good advocacy skills in support of the military community. MAJ Pottorff.

Reimbursing Expenses Due to Cancelled Leaves

It is five days before Christmas. PFC Murphy had saved for three months to fly home for the holidays and now he was there. Then the phone rang. PFC Murphy was being recalled to Fort Ord because of Operation Just Cause. He changed the date of his return flight and was back on duty the next day. But his ticket and his money were gone.

PFC Murphy, and many others like him, had his leave cut short or cancelled during Operation Just Cause. The staff judge advocate recognized the financial hardship that can occur when prior plans must be changed after the money is spent, and he set in motion the Fort Ord program designed to reimburse these soldiers. This program, established after "Golden Pheasant" and "Nimrod Dancer" and contained in a memorandum of instruction, describes how to process requests for reimbursement of expenses due to cancellation of leave during contingency operations. Such reimbursement is authorized under the provisions of Joint Federal Travel Regulation, Volume I, Paragraph U7220.

If a soldier is on authorized leave of absence and it is necessary to cancel the leave and recall the soldier, the soldier is authorized per diem, transportation, and other reimbursable expenses covering return to duty station if the cancellation was based on an actual contingency operation. The soldier initiates the procedure by requesting reimbursement through his or her unit commander on DA Form 4187. The commander adds a recommendation on the same form. The soldier must provide documentation to verify the reimbursement cost (e.g., copies of airline tickets, bus tickets, etc.). A Request for Orders (DA Form 2446) is prepared and forwarded to the Personnel Actions Branch where orders are issued. After completing a DD Form 1351-2 (Travel Voucher), the soldier takes all documents to the Travel Branch where the request for reimbursement begins its journey through the Finance and Accounting Office.

This Fort Ord program also sets forth the procedures for soldiers to request that their leave be excused as

⁶⁸ FAR 53.301-28.

⁶⁹ FAR 28.203(a) (FAR 28.202-2 as superseded by FAC 54-53).

⁷⁰ Hughes & Hughes, Comp. Gen. Dec. B-235723 (6 Sept. 1989), 89-2 CPD ¶ 218.

⁷¹ Comp. Gen. Dec. B-236239.2 (6 Oct. 1989), 89-2 CPD ¶ 328.

nonchargeable or to request resumption of an interrupted leave. The criteria for these actions are contained in AR 630-5.

Both aspects of this program are available to soldiers whether or not they actually deployed to Panama. Additionally, the request may be initiated upon the soldier's return.

The key to a successful reimbursement program is publicity—our soldiers must be made aware that reimbursement is available so they can decide whether to request it based on their own personal circumstances. All rear detachment commanders were briefed within eight days of the beginning of Operation Just Cause, and each commander was provided with a copy of the memorandum of instruction. Representatives of the SJA office included this topic in their briefings to family support groups. Soldiers and family members were encouraged to ask any questions they might have and to request reimbursement when appropriate.

This program was enthusiastically received by soldiers and was well-supported by commanders as a fair means to compensate for disruption of individual plans. Knowing they would be reimbursed for these expenses allowed our soldiers to concentrate on the important tasks awaiting them in Panama. Lannette J. Moutos, Acting Chief, Legal Assistance, Office of the Staff Judge Advocate, Fort Ord.

The No Refund, Refund

Operation "Just Cause" got a lot of people moving, including about half of the 7th Infantry Division (Light) at Fort Ord (the "Light Fighters"). Soldiers were contacted in the middle of the night, some at points far distant from home. It was the holiday season, and they were about to begin leaves and join their families all over the country.

Many of these soldiers had bought airline tickets or other travel packages that were called "no refund, no exchange"; the idea was that they paid for their travel whether they used the tickets or not. Then the President called for troops to go to Panama, and some of them had no chance to use their tickets or do anything about them.

Soldiers and their families had invested many hundreds, sometimes thousands, of dollars in travel packages. Did they lose all that money, through no fault of their own? Not at Fort Ord, they didn't.

The SJA office immediately swung into action with the plan we already had in place and had used twice before. When "Golden Pheasant" and "Nimrod Dancer" had created this same problem, the Fort Ord lawyers took on the task of working with the Scheduled Airline Ticket Office (SATO) and the civilian travel vendors to obtain full refunds for the affected soldiers and their families. With the full involvement and cooperation of SATO, we had been able to achieve one hundred percent success in securing refunds for deployed and recalled soldiers and their families.

Just Cause involved a lot more people, and it happened just before the holiday season. In anticipation of a large number of refund requests, the staff judge advocate tasked the Litigation and Claims Branch with initiating the "Negotiator of Last Resort" program. Under this program, ticket purchasers first request refunds through SATO or their other ticket agent. If that fails, Army lawyers negotiate directly with the vendor, working up the vendor's "chain of command" as high as necessary to secure the refund.

Litigation and Claims' first steps included publishing a message to every command on Fort Ord, telling them about our and SATO's availability to help the soldiers and their families. The acting branch chief conferred with the SATO manager and visited the rear detachment commanders. The staff judge advocate called a meeting of all those commanders and their key subordinates, and the military pay and legal offices briefed them. Hand-outs were provided for later reference, and lines of communication were established for easy, rapid contact.

Litigation and Claims sent a representative to several family support conferences to brief the wives on what we were doing. A notice was published in the "Panama Bulletin," a periodic memorandum established by the 7th Infantry Division Commanding General to keep families advised on the deployment and to advise on various family concerns.

We were open for business, and it didn't matter how people contacted us. Some called and some came in; calls came from soldiers and families as far away as Illinois, Minnesota, and Massachusetts. We designed a short, simple form letter to send to SATO or directly to the airlines and other travel vendors. They were most cooperative. All we needed was the soldier's name, rank and unit, and the names of any other travelers in the same package, and we produced and delivered the letters in an hour or less.

It took two basic ingredients to make our program work: 1) an attitude of cooperation among all concerned, especially the travel vendors; and 2) a quick, easy mechanism to accomplish the task. Fortunately, we have both at Fort Ord. The most important lesson we learned was that the job is not difficult if we do certain things: have the program mechanism ready to go; get the word out to the units and families; be always available to help; and always act quickly to respond and meet the need. Richard J. Relyea, Acting Chief, Litigation and Claims Branch, Office of the Staff Judge Advocate, Fort Ord.

Nassau-Suburban Furniture, Inc.

Legal assistance attorneys in the New York and New Jersey area should be prepared to assist clients with complaints against Nassau-Suburban Furniture, Inc., a now-defunct furniture store chain. The New York Attorney General is suing the store chain for engaging in deceptive advertising and deceptive business practices.⁷² The Attorney General is seeking over \$200,000 in restitution and \$1,500,000 in penalties from the company.

⁷² *Consumer Protection Report*, National Association of Attorneys General, at 17 (Nov.-Dec. 1989).

According to the Attorney General, in 1988 Suburban Furniture allegedly advertised going-out-of-business sales. Subsequently, Suburban did not honor delivery dates, refunds, and cancellation requests. After the Attorney General investigated, the company agreed to make restitution or fulfill obligations to hundreds of customers. The company went out of business, however, before it paid all claims as it had promised.

Next, Suburban ran newspaper ads for six months advertising a "final" going-out-of-business sale that actually lasted for seventeen months. Although the ads indicated that sales were depleting existing stocks, the company actually continued to add new furniture to its inventory—a practice prohibited by New York law under these circumstances. As a result of its allegedly deceptive advertising and business practices, Suburban has been the subject of 900 consumer complaints. Legal assistance attorneys who have clients with complaints against Suburban Furniture should contact representatives of the New York Attorney General's office at (212) 341-2519. MAJ Pottorff.

National Technical Schools Home Study Division

In California, the state Attorney General is suing National Technical Schools Home Study Division (NTSHS) and United Education and Software, NTSHS's parent company, for violating state consumer protection laws.⁷³ According to the California Attorney General, NTSHS used door-to-door sales to enroll consumers in a home-study computer science course. The charge was \$2,675 per student. The Attorney General alleges that the company falsely claimed that students would be expertly prepared for entry-level data processing positions or would be able to operate successful home businesses. Other promises by NTSHS included a free computer, low dropout rates, a toll-free number for help, and payments for referring new students to NTSHS.

The Attorney General is seeking \$24,000,000 in restitution and civil penalties. Approximately 9,000 consumers were allegedly defrauded by NTSHS. If California succeeds in its case, these students may receive restitution for their losses. Legal assistance attorneys who have clients with complaints against NTSHS should contact representatives of the California Attorney General at (213) 736-3645. Attorneys in other states should direct complaints concerning similar activities to state and local

consumer protection offices and the Federal Trade Commission.⁷⁴ MAJ Pottorff.

Rescission of Home Equity Loans— Truth in Lending Act Defenses

Home equity loans, frequently described as second mortgages, are a common and ready source of credit for such purposes as home improvements, medical expenses, and college tuition. Unfortunately, many consumers do not always fully appreciate that one of the consequences of default may be foreclosure and loss of their homes.

To protect consumers who choose to apply for home equity loans, Congress provided a limited rescission remedy⁷⁵ in the Truth in Lending Act.⁷⁶ Rescission is available if the loan is a non-purchase money security interest⁷⁷ in the consumer's principal dwelling.⁷⁸ Consumers may rescind home equity loans up to midnight of the third business day following consummation of the transaction, delivery of the rescission forms to the consumer, or delivery of the notice of the right to rescind to the consumer, whichever is later. At this stage, a consumer need not have or provide a reason for the rescission; the right to rescind during the first three days is unlimited.

After the three-day period has passed, rescission is still available if the lender failed to make required material disclosures to the client. These disclosures include the annual percentage rate, the method of determining the finance charge, the balance upon which the finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total payments, the number and amount of payments, and the due dates or periods of payments scheduled to repay the indebtedness.⁷⁹ If the creditor fails to make the required disclosures, the consumer may rescind the transaction up to three years after the date of the transaction or upon the sale of the dwelling, whichever occurs first.⁸⁰

When a consumer does exercise the right to rescind, the results are significant. The creditor must return any down payments, all accrued finance charges, any application and commitment fees, and fees for title searches and appraisals, whether paid directly to the creditor or to a third party.⁸¹ Once the creditor has made the required refunds, the consumer must return any loaned money or property to the creditor.

⁷³ *Id.* at 22.

⁷⁴ Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C. 20580.

⁷⁵ 15 U.S.C. § 1635(a) (1982).

⁷⁶ 15 U.S.C. §§ 1601-1667 (1982 & Supp. V. 1987), as amended by the Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725, and the Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960.

⁷⁷ A non-purchase money security interest means that the loan in question was not used to finance the actual purchase of the home. A home equity loan, for example, is a non-purchase money security interest.

⁷⁸ A dwelling for purposes of rescission includes structures, such as mobile homes and houseboats, that often are classified as personal property under state law. 12 C.F.R. § 226.2 (1988). The structure must, however, be the consumer's principal dwelling.

⁷⁹ 15 U.S.C. § 1602(u) (1982).

⁸⁰ *Id.* § 1635(f).

⁸¹ *Id.* § 1635(b); Official Staff Interpretations, 12 C.F.R. § 226.15(d)(2)1 (1988).

A recent Arizona case illustrates the consumer-oriented approach many courts take with truth in lending issues. In *Smith v. Wells Fargo Credit Corp.*⁸² the Smiths, a married couple, obtained a home equity loan from Justice Mortgage Company, which assigned the loan to Wells Fargo Credit Corporation. Justice Mortgage made all required disclosures, including the right to rescind, at the time of closing in June 1985. Justice Mortgage improperly calculated the amount of the Smiths' monthly payment, however, indicating it was half of what it actually should have been.

The following month, the lenders notified the Smiths of the error and provided corrected loan documents for the Smiths to sign. Although the Smiths challenged the corrected amount and lost in litigation, they did not attempt to rescind the loan until March 1988.

The lenders and the Smiths agreed that at the time the correct monthly payment amount was disclosed to the Smiths, the lenders did not provide the Smiths a second notice of their right to rescind. The lenders argued they had no legal obligation under truth in lending laws to make such a second disclosure. The court disagreed.

The court noted that technical or minor violations of the Truth in Lending Act and its implementing regulations, as well as major violations, entitle consumers to rescind home equity loans.⁸³ It concluded that a "consumer has a continuing right to rescind until the creditor provides the rescission notice and also supplies a copy of the TIL disclosure statement."⁸⁴ To comply properly with disclosure requirements, the lenders should have given the Smiths new rescission forms with a correct expiration date when they gave notice of the corrected monthly payment amount. Because the lenders failed to provide the proper rescission notice in July 1985, the Smiths' action to rescind the loan in March 1988 was a continuing right and was timely.

When clients are seeking relief from home equity loans, legal assistance attorneys should scrutinize disclosure documents provided by lenders. Minor deviations in required disclosures, including the rescission notification, will give rise to an action for rescission. Just because rescission is available, however, does not necessarily make it a reasonable alternative for a client. If the cost

of credit has risen since the client initiated the loan transaction and the client still needs credit, rescission may not be appropriate. Attorneys should, however, consider rescission as a possible remedy for every home equity loan problem. MAJ Pottorff.

Tax Notes

Congress Changes Penalty Provisions of the Tax Code

In response to numerous complaints, Congress overhauled the penalty provisions of the Internal Revenue Code in legislation known as the Improved Penalty Administration and Compliance Tax Act of 1989 (IMPACT).⁸⁵ These changes will affect attorneys advising taxpayers because they modify the analysis of what constitutes good authority for purposes of avoiding certain penalties.

New section 6662 has been added to the code to impose an accuracy penalty equal to twenty percent of the underpayment of tax attributable to negligence, disregard of rules or regulations, substantial understatement of income tax, or substantial value overstatements.⁸⁶ The new section repeals and replaces prior code provisions that imposed a negligence penalty,⁸⁷ the substantial understatement penalty, and a variety of valuation penalties.⁸⁸

Under new section 6662, if an underpayment of tax is attributable to negligence, the negligence penalty applies only to the portion of the underpayment that is attributable to negligence.⁸⁹ Under previous law, the entire underpayment of tax was subject to penalty, not just the portion of the underpayment attributable to negligence. Negligence includes any failure to make a reasonable attempt to comply with the provisions of the Code. The accuracy penalty will also be assessed for any careless, reckless, or intentional disregard of rules or regulations.⁹⁰

The new section 6662 lowers the penalty from twenty-five percent to twenty percent for the portion of an underpayment attributable to a substantial understatement of income tax. The new law substantially broadens the type of legal authority that taxpayers can use to avoid penalties for substantial understatement of taxes.

⁸² 713 F. Supp. 354 (D. Ariz. 1989).

⁸³ *Id.* at 355 (quoting *Semar v. Platte Valley Fed. S. & L. Assoc.*, 791 F.2d 699, 704 (9th Cir. 1986)).

⁸⁴ 713 F. Supp. 354, 355 (quoting *Truth in Lending*, National Consumer Law Center, 137 (1986)).

⁸⁵ Title VII, Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, ____ Stat. ____ (1989) [hereinafter 1989 Act]. This legislation was introduced as part of H.R. 3299, the Revenue Reconciliation Bill of 1989. For a comprehensive article discussing the new legislation, see Banoff, *Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties: The Impact of IMPACT*, *Taxes-The Tax Magazine*, January 1990, at 40.

⁸⁶ I.R.C. § 6662, as added by 1989 Act § 7721(a).

⁸⁷ Under pre-1989 law a negligence penalty of five percent of the total amount of underpayment was assessed if the underpayment was due to negligence or disregard of rules.

⁸⁸ Under pre-1989 law, penalties could be assessed if income taxes were underpaid as a result of a valuation overstatement. A valuation overstatement existed if the valuation or adjusted basis of any property claimed on a return was 150% or more of the correct value or adjusted basis. The amount of the penalty increased as the percentage by which the valuation claimed exceeded the correct valuation. Penalties were also imposed for underpayments due to overstated pension liabilities or understated values for estates and gifts.

⁸⁹ I.R.C. § 6662(b)(1), as amended by 1989 Act § 7721.

⁹⁰ I.R.C. § 6662(c), as added by 1989 Act § 7721(a).

Filing Tax Returns on Time

The expanded list includes: proposed regulations, private letter rulings, technical advice memoranda, actions on decisions, general counsel memoranda, information or press releases, notices, or any other similar documents published by the IRS in the Internal Revenue Bulletin.⁹¹ Congress has, however, empowered the Treasury Department to issue regulations providing that certain items in this list should not be regarded as authority. The IRS will be required to publish, at least annually, a list of positions that the IRS believes lack substantial authority.⁹²

A "reasonable cause" and "good faith" exception applies to all accuracy-related and fraud penalties. A penalty will not be imposed if it is shown that there was reasonable cause for the underpayment and the taxpayer acted in good faith.⁹³

The new legislation also modifies the test and amounts for tax preparer penalties. The new law imposes a \$250 penalty for understatements due to positions that do not have a realistic possibility of being sustained on their merits.⁹⁴ The realistic possibility standard was adopted because it generally reflects the professional conduct standards that apply to lawyers and accountants.⁹⁵ The penalty can be avoided if the paid preparer adequately discloses the position in the return or supplemental explanation.⁹⁶ A stiff new \$1,000.00 penalty can be imposed against income tax preparers for engaging in willful or reckless conduct.⁹⁷

Legal assistance attorneys are not paid return preparers and therefore are not subject to the preparer penalties. They should, however, comply with the new standards when advising taxpayers and helping them complete their federal tax returns because the new standards are based on professional ethical standards.

As a result of the new legislation, a different standard for asserting positions exists between taxpayers and paid return preparers. Taxpayers can avoid the new accuracy penalty by having a "reasonable basis" for their position and not being negligent. Paid return preparers, on the other hand, must have a realistic possibility of success for positions they assert on federal income tax returns. Thus, taxpayers who wish to play the audit lottery may have an unintended incentive to prepare their own returns. MAJ Ingold.

While most taxpayers are firmly aware of the deadline for filing income tax returns, few understand the consequences for noncompliance. Knowledge about IRS filing requirements can help taxpayers mitigate the consequences of filing a tardy return.

Because April 15th falls on a Sunday in 1990, taxpayers will have until April 16th to file their federal income tax returns. Soldiers living outside the United States or Puerto Rico on April 16th have until June 15th to file their returns.⁹⁸ This automatic extension is not, however, an extension of time to pay. Thus, interest will be charged on unpaid tax from the original due date of the return. It is also important to note that the final date for making Individual Retirement Arrangement contributions for the 1989 tax year ends on April 16th, even for those qualifying for the overseas extension.

A federal tax return will be considered filed on time even if received by the IRS after the due date, as long as the envelope bears a U.S. postmark on or before the due date. The return must be properly addressed and carry the proper postage to receive the presumption of timely filing. Returns that are mailed by registered mail will be considered filed as of the postmark date.

If taxpayers are unable to file on time they are entitled to an automatic four-month extension of time to file. Taxpayers should file Form 4868, "Application for Automatic Extension of Time to File U.S. Individual Tax Return," on or before the due date of the return to receive the extension. Form 4868 should be filed with the IRS Service Center handling returns for the state in which the taxpayer lives. Note that taxpayers filing Form 4868 cannot thereafter use Form 1040EZ.

No reason for the request is necessary, but taxpayers will be required to make a tentative assessment of their tax for the year and pay an estimated balance. Taxpayers will not be subject to any penalty if their estimate is within ninety percent of actual liability. If unpaid taxes are due, interest will be assessed from the original due date of the return until the date of payment.

Taxpayers needing more time beyond the four-month extension may request an additional extension of up to two months by filing Form 2688, "Application for

⁹¹ Under Treasury Regulation § 1.6661-3(b)(2), valid authority also included the following: code provisions; other tax acts; temporary and final regulations; court decisions; revenue rulings and revenue procedures; tax treaties; and congressional intent as expressed in congressional reports. Excluded from the list of authority are legal periodicals and treatises and legal opinions issued by tax professionals.

⁹² I.R.C. § 6662(d)(2)(D), as added by 1989 Act § 7721.

⁹³ I.R.C. § 6664(c)(1), as added by 1989 Act § 7721.

⁹⁴ I.R.C. § 6694(a), as amended by 1989 Act § 7732(a).

⁹⁵ See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 85-352 (1985) and AICPA Statements, Tax Return Positions § .02a.

⁹⁶ I.R.C. § 6694 (a)(3), as added by 1989 Act § 7732(a). Adequate disclosure is not, however, a defense if the preparer's position was so weak as to be frivolous.

⁹⁷ I.R.C. § 6694(b) as amended by 1989 Act § 7732(a). Prior law included a \$500 penalty for willful understatement by a tax preparer.

⁹⁸ Travelling outside the United States on April 16th will no longer qualify the taxpayer for an automatic two-month extension.

Additional Extension of Time to File U.S. Individual Income Tax Return." Taxpayers should submit an explanation along with the form describing the reason for the request and the length of time needed to file. The form should be mailed to the IRS well before 15 August to provide enough time to file the return if the IRS denies the request.

Taxpayers living overseas on April 16th need not file any forms to obtain the automatic extension to June 15th. Taxpayers should, however, attach a statement to their return stating that they were living outside the United States or Puerto Rico on April 16th. If married persons intend to file a joint return, only one of the spouses needs to be living outside the United States or Puerto Rico on April 16th to qualify for the automatic two-month extension. If married, filing separate, returns are filed, only the spouse living outside the United States or Puerto Rico qualifies for the automatic overseas extension.

Overseas taxpayers may need additional time beyond the automatic two-month extension to file their returns. They can obtain an additional two-month extension, until August 15th, by filing Form 4868 on or before June 15th. An additional two-month extension to October 15th may be requested by filing Form 2688 with appropriate justification.

Taxpayers earning income abroad may be entitled to claim the foreign earned income exclusion if they have been physically present in a foreign country for at least 330 days during any consecutive twelve-month period.⁹⁹ Taxpayers may apply for a special extension, by filing Form 2350, in order to give them sufficient time to determine whether they will be able to satisfy the physical presence test.¹⁰⁰ Form 2350 should set forth the reason for requesting the extension and be mailed to the IRS Service Center in Philadelphia, PA 19255. Filing Form 2350 will give a taxpayer additional time for filing a return, but not for payment of tax.

The IRS will assess interest on any taxes not paid by April 16th. Interest on unpaid tax liabilities runs from the due date until the date the tax is paid.¹⁰¹ The interest rate charged by the IRS is three percent over the short-term federal rate and is compounded daily.

The IRS may also assess penalties against taxpayers who fail to pay taxes on time. The penalty is five percent of the amount of tax underpaid, plus an additional five percent for each month over one month up to a total of twenty-five percent.¹⁰² Taxpayers who have requested extensions or qualify for the automatic two-month extension will not be penalized for late payment if they pay taxes due by the extended filing date. As mentioned

previously, however, they will be subject to payment of interest on the amount due.

Many taxpayers are surprised to learn that there is no penalty or fine for filing a late return if there has been an overpayment to the IRS. Of course, taxpayers having refunds due should make every possible effort to file on time.

The IRS is subject to paying interest if it fails to pay refunds expeditiously. Interest on overpayments is payable, however, only if the refund is not made within forty-five days of the due date of the return or the date of filing a late return. Accordingly, a taxpayer who files a return on February 1, 1990, showing a refund owed, will not be entitled to interest unless the IRS fails to mail the refund by June 1, 1990 (forty-five days after April 16th, the due date of the return). The interest rate on overpayment of tax is one percent less than the underpayment rate, or two percent over the short-term treasury rate. MAJ Ingold.

Estate Planning Notes

Insurance Bequest Held Ineffective When Change of Beneficiary Forms Not Filed

The need to coordinate will provisions with life insurance beneficiary designations was again highlighted in a recent Michigan case, *In re Estate of Norwood*.¹⁰³ In this case, the testator left each of his four children a specific bequest of \$6,000, to be funded by the proceeds of an insurance policy. The named beneficiary of the policy, however, was the testator's wife, and the testator made no attempt to change the designation prior to his death.

The testator's children argued that the will contained a latent ambiguity. They pointed out that because the testator never changed the beneficiary of the life insurance policy, the cash gifts made no sense. They argued that the assets described never became part of the estate. The court rejected this argument by noting that the will clearly treated the insurance proceeds separately from the rest of the estate. The court refused to create an alternative bequest to be paid out of general assets when the testator failed to indicate that this was his intention.

The court also rejected the children's argument that they should be entitled to an intestate share of the estate because they were pretermitted heirs. The pretermitted heirs statute comes into effect only if the testator fails to provide for the children in the will. The court noted that the testator did provide for his children in the will but, unfortunately, failed to take the steps necessary to bring the necessary funds within his estate. The court did not consider the possibility that the wife should be required

⁹⁹ I.R.C. § 911 (West Supp. 1989); Treas. Reg. § 1.911-2(a)(2).

¹⁰⁰ Treas. Reg. § 1.911-7(c)(2).

¹⁰¹ I.R.C. § 6601(b)(1) (West Supp. 1989).

¹⁰² I.R.C. § 6651(b)(1) (West Supp. 1989). The IRS also imposes a late filing penalty on taxpayers who fail to file on time and owe on their return. In most cases, both the late filing penalty and the late payment penalty will both apply to a late filer who owes taxes. Under these circumstances, however, the late penalty payment is subsumed within the late filing penalty.

¹⁰³ 443 N.W.2d 798 (Mich. App. 1989).

to make an equitable election between the will and the life insurance proceeds.

It is quite likely that the testator in *Norwood* intended to benefit his children, but merely did not change his beneficiary designation. Attorneys involved in assisting clients making similar bequests should strongly suggest that immediate action be taken to ensure harmony between the will and insurance policy beneficiary forms. MAJ Ingold.

Revocable Inter Vivos Trusts as an Estate Planning Tool

Revocable *inter vivos* trusts, or "living trusts" as they commonly are called, have been touted as an important estate planning tool for middle income clients. Articles in newspapers and magazines have alerted readers to the potential benefits of these devices, and books such as the best-selling *How To Avoid Probate* have attempted to show laymen how to set up such a trust without the help of an attorney. But do these trusts make sense for legal assistance clients? And, if they are appropriate, what role should a legal assistance attorney play in setting up a trust?

In a living trust arrangement, the grantor creates the trust by executing a trust document and transferring all assets into the trust corpus. The grantor names himself or herself as the trustee and beneficiary, with full discretion in determining how the trust assets and income will be used. Maximum control over the property is further achieved by providing that the grantor/trustee may terminate the trust at any time and for any reason.

The trust instrument also provides instructions on how to distribute the corpus after the grantor/trustee's death. To efficiently accomplish this distribution, the trust instrument usually appoints a successor trustee to take control of the corpus upon the grantor/trustee's death. There also may be a provision that allows the successor trustee to take control if the grantor/trustee becomes incapacitated or otherwise unable to manage the trust.

Under this arrangement, the grantor has only a beneficial ownership of the trust corpus, and it is limited to a life estate. This interest terminates upon death, and the property is then disposed of in accordance with the provisions of the trust instrument. If all the grantor/trustee's property has been transferred into the trust corpus, there is no estate to be distributed by will or intestate succession, and there is no estate that is subject to probate.

Proponents usually cite avoidance of probate costs as the chief advantage of a living trust. State laws vary widely on probate costs, however. Additionally, the size of the estate can have a significant impact on these expenses. Thus, savings of probate costs may or may not be a significant estate planning issue for a given client.

Another often-cited advantage of living trusts is the avoidance of delays that probate proceedings usually entail. When an estate is probated, the surviving family members are denied control of important assets, such as a home, for several months. The delay can be much longer in some states, and this can lead to severe hardship if the surviving family is strapped for cash. In

contrast, under a living trust arrangement the family immediately can take control of the asset and lease it or sell it as necessary.

Many individuals can achieve both these cost and time savings, however, without resorting to a living trust. The simple expedient of owning property in joint tenancy with the right of survivorship allows property to pass to survivors without probate. Homes, automobiles, bank accounts, and other assets that are held under such an arrangement are not included within a deceased's estate for probate purposes. Instead, title to the property passes directly to the co-tenant(s) as a matter of law at the time of death.

Joint tenancy has its own drawbacks, of course. These include the need to have the co-tenant's approval of transactions regarding the property, such as mortgages, liens, leases, and sales (a power of attorney largely can ameliorate this problem, however). Moreover, in many states, access to jointly-held financial accounts may be delayed after the death of one of the tenants until state revenue authorities authorize release of the funds. While this process usually does not take as long as probate, it still can delay use of the funds for a matter of weeks. Finally, and perhaps most ominously, jointly-owned property may be subject to attachment in satisfaction of the co-tenant's financial obligations.

The same cost and time savings also can be achieved for limited classes of property by registering or holding it with a "pay on death" or "transfer on death" provision. Under these arrangements, which are created by statute, if at all, a person owns or holds the asset solely in his or her name. Upon death, however, title to the property immediately passes by operation of law to the designated person. The most common use of a "pay on death" provision is with respect to U.S. savings bonds, but in some states it also can apply to financial accounts, automobiles, boats, and other assets.

Living trusts have other advantages in addition to reducing probate expenses and delays. For example, a properly drafted trust document can eliminate the need for guardianship proceedings if the grantor/trustee becomes incapacitated. Rather than someone going to court to be appointed a guardian of the grantor/trustee's property, the trust document simply designates a successor trustee. A Reserve judge advocate with experience in this area of the law has observed that guardianship actions can cost over \$10,000, so the potential savings are considerable. On the other hand, those jurisdictions that recognize springing powers of attorney provide a sound and much less complex alternative for achieving the same goal.

This mechanism also allows the grantor/trustee to determine who should serve in this capacity, rather than leaving the decision up to a judge. Perhaps more importantly, it permits the grantor/trustee to create binding guidance on how his or her affairs should be conducted during the period of infirmity. This can be especially significant if the trust corpus includes business interests and income-producing property.

Privacy is another advantage of a living trust. Probate proceedings are a matter of public record, so anyone can

review court documents to determine the size and beneficiaries of a probated estate. A trust document, on the other hand, generally need not be made public. The estate (i.e., the trust corpus) can be distributed without filing documents in court and with a high degree of privacy.

Finally, a living trust allows an efficient administration of the grantor/trustee's estate. Not only are delays eliminated, as discussed above, but the whole procedure is less cumbersome. A wide variety of property management actions can be conducted without the need for court approval. This can be particularly important if the grantor/trustee had business relationships that need to be concluded.

Unfortunately, these advantages are not without cost. Every time the grantor/trustee acquires new assets, they must be transferred to the trust for the arrangement to be effective. This requirement arises whenever the grantor/trustee buys a home or an automobile, and even when he or she opens a new financial account. Perfection of the transfer may entail the need for attorneys' services (and the attendant legal fees). Additionally, transferring currently-owned mortgaged property into the trust corpus may be considered a "sale" under the terms of the mortgage agreement. This could trigger a need for a new mortgage along with the usual financing expenses and legal costs. Worse, lending institutions may not be willing to extend credit for the purchase (or refinancing) of property that will be held in a living trust.

Even if an attorney's services are not necessary every time an asset is acquired, a living trust arrangement creates discomfort for some clients. The grantor/trustee must remember to register or title *all* property in the trust's name, not his or her own. Checks must be signed in the individual's capacity as the trustee of the account. Additionally, there is the psychological burden of transferring everything one owns to a separate legal entity, technically leaving the grantor/trustee without any property of his or her "own." For many, of course, these details are no problem at all. But for others, the trouble may not be worth the gain.

Counsel carefully should delve into these matters before creating a living trust. The issue is, "Is the client likely to follow through with the trust arrangement for the rest of his or her life?" Without some certainty that the client will do so, creating the trust will be a waste of time. More ominously, a half-hearted effort to use the trust could generate confusion in the client's mind as to the state of his or her affairs, with disastrous consequences for the estate and beneficiaries after death.

There are other disadvantages, as well. Living trusts are governed by local law, so drafting difficulties arise for clients who own property, especially realty and business interests, in several states.

Active duty military personnel potentially face yet another problem if they choose to create a living trust. Under the Soldiers' and Sailors' Civil Relief Act, a soldier's personal property can be exempt from some taxes imposed by state and local governments where he or she is stationed. For example, a soldier who is

stationed in Virginia but domiciled elsewhere can avoid personal property taxes on an automobile. This can yield a savings of several hundred dollars each year. If legal title to the automobile is held by a living trust, however, there is a serious question whether the tax exemption still is applicable.

There is another drawback to living trusts that should be mentioned. State laws typically exempt "homestead property" from execution to satisfy judgments. Homestead exemptions can prevent creditors from attaching a home, furniture, and an automobile. As with the Soldiers' and Sailors' Civil Relief Act, however, these important protections may not extend to property that is held in trust.

Having examined the benefits and disadvantages of a living trust, it is also important to analyze what this estate planning tool does not do. There are three misconceptions about living trusts that should be dispelled. First, revocable living trusts do *not* afford any opportunity to save estate taxes. Only a carefully drafted irrevocable trust can accomplish this goal, and living trust arrangements are incompatible with some tax avoidance strategies. Second, creation of a living trust arrangement does not obviate the need for a will. Despite the grantor/trustee's best efforts, the estate can include assets that are not within the trust. Thus, it still is important to have an up-to-date will. The third misconception is that the popular form books on this topic, such as *How to Avoid Probate*, provide answers for all situations. They do not, and several Reserve component judge advocates familiar with the use of living trusts have observed that this "do-it-yourself" approach has caused some severe problems after the grantor/trustee has died.

Are living trusts a good idea for legal assistance clients? Active duty clients are unsettled, and they tend to be relatively young. Their mobility presents drafting difficulties, and, because of their youth, they will have to observe trust formalities (i.e., acquiring and transferring property to the trust) for many years. In addition, there are the other disadvantages previously discussed.

Consider these problems in light of the possible benefits. Active duty clients typically have modest estates, which means that trust arrangements may not save much in the way of probate costs. Moreover, the bulk of the estate value probably lies in financial accounts and real property. As noted above, these assets often can be shielded from probate without resorting to a living trust arrangement.

The other major benefit of a living trust that may appeal to active duty clients is the ability to appoint an individual to manage personal affairs in the event of incapacity, including being in a "missing in action" status. A springing power of attorney may be nearly as effective a tool to circumvent the problems that can arise in this situation, but not all states recognize such appointments. In the final analysis, only the client can determine whether the issue is so important as to merit creation of a living trust.

So far, we have been talking about the average legal assistance client. What about active duty personnel who

have acquired considerable assets? What about retired clients? If the question is, "Should these people use a living trust as an estate planning tool?" it should be clear by now that there is no clear answer. The client must decide whether the prospect of saving money for his or her survivors is worth the effort and expense that a living trust entails.

What is clear is that legal assistance attorneys should discuss the advantages and disadvantages of living trusts with clients who could benefit from such an arrangement, whether or not the client asks about living trusts. For example, advice on this matter could be incorporated into the explanation of various tax-avoidance strategies that also should be a part of a legal assistance attorney's counselling for wealthy clients. It also could be integrated into a discussion of probate for other clients who should be aware of the issues involved.

The fact that a legal assistance attorney discusses these matters with clients does not mean that he or she should prepare living trust documents, however. The intricacies can be considerable, especially in relation to mortgaged property. Nonetheless, an attorney who has the time and expertise to provide the service is not prohibited from doing so. On the other hand, most legal assistance offices probably do not have the resources to do the job well. In these cases, clients who desire to pursue the matter should be referred to competent civilian practitioners who have experience in the area of estate planning. MAJ Guilford.

Gift of Home to Wife Raises Construction Problem

The court in *Disabled American Veterans v. Mullin*¹⁰⁴ dealt with a will construction problem caused by an unclear devise of a family home. The will gave the testator's community share of the home to his wife, with full power to sell or dispose of it as she wished. If the wife did not dispose of the home at the time of death, the will devised the property to alternative beneficiaries.

The testator's wife did not sell or give away the home during her lifetime. Her will, however, contained a residuary clause disposing of all her property.

The court applied several rules of construction to hold that the testator's will conveyed a fee simple interest to his wife. According to one rule of construction, if a will does not clearly indicate an intent to convey lesser title, it will be held to convey fee simple absolute. Another rule of construction requires the court to ascertain the intent of the testator and effectuate that intent as far as possible.

The court determined that, based on the language used in the devise "to dispose of the [home] as to her may

seem best," the testator desired to convey a fee simple interest. According to the court, the testator's widow effectively disposed of her fee simple interest by making out a will. The court's reliance on the widow's testamentary disposition of the home suggests, however, that the gift over might have been effective if she had died intestate. MAJ Ingold.

Professional Responsibility Note

Lawyer Ordered to Reveal Whereabouts of Child-Abducting Client

A Connecticut court has held that a lawyer who represents a woman who has left the country with her children in violation of a court order must disclose the whereabouts of the client.¹⁰⁵ The court held that the attorney-client privilege does not apply to the information because the client's action in removing the children in violation of court order amounts to a fraud upon the court.

The client in the case filed for dissolution of her marriage and was awarded custody *pendente lite* of the two children. The court order required her to give thirty days' written notice of her intention to leave the country. The client requested the court to permit her to move the children to Spain pending the dissolution hearing, but the court denied the request.

The husband learned that his wife had left the country anyway and sought information concerning her whereabouts from her attorney. The attorney declined to release any information, but admitted that he knew her location. The husband sought a court order compelling the attorney to reveal the information.

After exploring case law from several other states,¹⁰⁶ the court concluded that the crime or fraud exception to the attorney-client privilege enabled the court to compel the lawyer to reveal his client's whereabouts. The court also held that ethics rules protecting client information did not apply under the circumstances of the case. Under the Connecticut Rules of Professional Conduct, a lawyer may release information relating to the representation of the client to the extent necessary to rectify the consequences of a client's criminal or fraudulent act.¹⁰⁷ Moreover, Rule 3.3 of the Connecticut Rules provides that "a lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . ." ¹⁰⁸

While the court acknowledged that the attorney did not advise his client to violate the court order, it determined that his refusal to disclose the client's where-

¹⁰⁴ 773 S.W.2d 408 (Tex. App. 1989).

¹⁰⁵ *Bersani v. Bersani*, Conn. Super. Ct., New Haven Jud. Dkt. No. 276057 (Aug. 24, 1989).

¹⁰⁶ See, e.g., *Fellerman v. Bradley*, 493 A.2d 1239 (N.J. 1985); *In re Jacqueline F.*, 417 N.Y.S.2d 884 (1979); *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333 (Mo. Ct. App. 1967); *Dike v. Dike*, 448 P.2d 490 (Wash. 1968).

¹⁰⁷ Connecticut Rules of Professional Conduct Rule 1.6(c)(2). Note that the Army Rules of Professional Conduct for Lawyers do not have this provision in Rule 1.6. A lawyer subject to the Army rules does not have discretion under Army Rule 1.6 to release information to rectify the consequences of a client's criminal or fraudulent act. DA Pam. 27-26, Army Rules of Professional Conduct (Dec. 1987).

¹⁰⁸ Connecticut Rules of Professional Conduct Rule 3.3(a)(2).

abouts did serve to assist an ongoing violation of a court order. The court weighed the importance of the attorney-client privilege against the state's interest in determining the best interests of minor children and held that the claim to the privilege must yield in these circumstances. MAJ Ingold.

Insurance Note

Uninsured Motorist Coverage

The 10th Circuit Court of Appeals has held that a service member barred under the *Feres* doctrine from recovery against the United States for injuries sustained as a result of an accident with a negligently operated government vehicle is entitled to recover under the uninsured motorist provisions of his automobile insurance policy.¹⁰⁹

The plaintiff received injuries valued at least in the amount of the \$100,000 uninsured motorist coverage under his USAA automobile insurance policy. *Feres* barred recovery against the United States, and the negligent driver of the government vehicle carried no liability insurance applicable to the accident. USAA argued that it was not liable for damages under the uninsured motorist coverage based upon the following policy provisions:

[USAA] will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle However, 'uninsured motor vehicle' does not include any vehicle or equipment

3. Owned by any governmental body unless:
 - (a) the operator of the vehicle is uninsured; and
 - (b) there is no statute imposing liability for damage . . . on the government for an amount not less than the limit of liability for this coverage.

The court reasoned that, in light of *Feres*, there was no statute imposing liability on the United States. The "legally entitled to recover" language of the policy was determined to go to "the ability to establish the uninsured driver's fault and the extent of insured's damages in order to recover, and does not extend the uninsured motorist's statute of limitation defense or some governmental immunity defense the U.S. has against suit by [the servicemember] to the insurance company." In the court's view, the "policy language would be rendered absolutely meaningless by interpreting 'legally entitled to recover' as the ability to sue the United States." MAJ Battles/MAJ Carazza.

Administrative and Civil Law Notes

State and Local Jury Service by Soldiers

Interim change I01, Army Regulation 27-40, Litigation, dated 27 November 1989, implements 10 U.S.C. § 982 (Supp. V 1987) and DOD Directive 5525.8 (32 C.F.R. Part 144) governing service by active duty soldiers on state and local juries. Under the new

provisions, the Army's policy is to allow soldiers to fulfill civic responsibilities, including jury service, consistent with military requirements.

The new regulation provides a blanket exemption from jury service for general officers, commanders, trainees, and soldiers assigned overseas or to tactical TOE units. Jury service by these soldiers necessarily interferes with readiness and accomplishment of the military mission. Other soldiers may be exempted from jury duty if the special court-martial convening authority (or higher-level commander who has reserved exemption authority) determines that jury service would unreasonably interfere with the performance of the soldier's military duties or adversely affect the readiness of the soldier's unit.

Non-exempt soldiers serve on state and local juries in a permissive TDY status. Soldiers may keep reimbursement for transportation, meals, parking, and similar expenses. Juror attendance fees, however, must be paid to the United States. CPT Hatch.

Digest of Opinion of The Judge Advocate General

Command Authority - Blanket Command Designation DAJA-AL 1989/2841 (27-1a), 17 November 1989

The senior regularly assigned officer present for duty normally has responsibility for the command of Army units. Problems arise when commanders want to appoint a junior officer as the acting commander when a senior officer is available within the same command. In response to a recent request, The Judge Advocate General provided specific guidance on the appointment of junior officers as acting commanders and the proper approval authority for such appointments.

General officers commanding major Army commands (MACOMs), armies, corps, installations, divisions, separate brigades, U.S. Army Reserve general officer commands, and heads of DA staff agencies are authorized to announce, by direction of the President, the designation of one of several officers of the same grade within a subordinate command as a commander or acting commander thereof (AR 600-20, para. 2-5b). When one of these general officers desires to temporarily place a junior member in his or her own position as acting commander, the approval of the next higher commander is required. Approval must be sought every time a commander wants to designate a junior officer as acting commander unless a blanket command designation has been approved by the appropriate authority.

Blanket command designations will not be issued without the approval of the MACOM commander (AR 600-20, para. 2-5c). In cases involving general officers of the same grade, the MACOM commander must forward the blanket designation request to Headquarters, Department of the Army for approval by the General Officer Management Office. The following examples explain the rule.

Example 1. A corps commander wants to temporarily appoint his deputy commander, a major general, as acting corps commander. A subordinate division com-

¹⁰⁹ United Services Automobile Association v. Blakemore, No. 10-89-049 (10th Cir. Nov. 30, 1989).

mander, also a major general, is senior to the deputy corps commander. The corps commander may submit a request to the MACOM commander for approval. No other approval is required. If the corps commander wants approval for a blanket command designation (so that the deputy corps commander may assume command whenever the commander is absent) HQDA must approve the request because it involves two general officers of the same grade.

Example 2. An installation commander wants to appoint his chief of staff, a colonel, as acting com-

mander. There are no other general officers assigned to the installation. The chief of staff is junior to several other colonels in the command. The installation commander may submit a request to the next higher commander for approval. If the installation commander wants approval for blanket command designation, only MACOM approval is required because this example does not involve general officers of the same grade.

Further guidance on command succession may be found in Chapter 2, AR 600-20. MAJ Dougall.

Claims Report

United States Army Claims Service

Claims Notes

Personnel Claims Recovery Note

When Carriers Contend That Mildew Damage is the Fault of the Nontemporary Storage Facility

Often, household goods in nontemporary storage are stored in a facility not owned by the carrier who delivers the goods. As a result, carriers often allege that any mildew or mold damage discovered by the shipper occurred during the period of nontemporary storage and is therefore not their liability. Any such denial without substantiating evidence to corroborate the denial is not acceptable. If mold or mildew existed at pickup from nontemporary storage, the carrier must prepare an exception sheet and note such damage. The exception sheet must include inventory numbers that correspond to the damaged items and must be signed by a representative of the nontemporary storage facility as well as the carrier's agent. The burden of proof is on the carrier to establish that the mildew or mold damage did not occur while the goods were in its custody.

The following is a suggested paragraph that may be used to rebut carriers who allege that mildew or mold damage occurred in nontemporary storage.

Your denial of liability for the mildew or mold damage is not acceptable without substantiating evidence to prove that it occurred during the period of nontemporary storage. Substantiating evidence is an exception sheet prepared at pickup from nontemporary storage that describes the mildew or mold damage, gives appropriate inventory numbers and is signed by a representative of the nontemporary storage facility as well as your agent. Please forward a copy of such an exception sheet if you have one. If you do not possess a valid exception sheet, your company is fully liable for the damage claimed.

Ms. Schultz.

Office Management Notes

USARCS Certification of Civilian Claims Attorneys

Unlike new claims judge advocates, new civilian claims attorneys must be certified by the Commander, USARCS, before they can be delegated authority to approve claims, (paragraph 1-6, AR 27-20). Unfortunately, a number of claims offices are neglecting to seek certification of their new civilian claims attorneys.

Claims attorney certification is personal to an individual, and each new claims attorney must be certified, even if the individual is experienced or that attorney's predecessor was certified. Previously certified civilian attorneys transferring to new installations must be recertified.

Requests for certification must be accompanied by justification for the need, a statement of the attorney's qualifications, a statement of the attorney's current duties, and the monetary authority desired under the various claims statutes. Claims offices are reminded that USARCS must be notified in writing of any change in status, such as termination of a certified attorney's employment at a particular installation. Mr. Frezza.

Conflicts Between Claims Bulletins and DA Pamphlet 27-162

DA Pamphlet 27-162 supersedes the claims bulletins published in the USARCS Claims Manual. Virtually all of the guidance contained in these bulletins has been incorporated into the DA Pamphlet. Accordingly, claims offices are no longer required to keep the Claims Manual on hand. Questions have arisen, however, concerning perceived "conflicts" between guidance published in DA Pamphlet 27-162 and guidance previously published in USARCS claims bulletins.

The guidance in the DA Pamphlet is controlling for claims processing on and after its publication date. In

nearly all instances, guidance previously published in claims bulletins has merely been restated in general terms in the pamphlet, using different examples. Note that where DA Pamphlet 27-162 states that particular types of personnel claims will "normally" be disapproved, such claims will be disapproved unless peculiar circumstances render the general rule inapplicable.

Questions concerning interpretation of the DA Pamphlet or perceived changes in policy should be referred to USARCS for resolution, either in writing through any intervening claims authority or telephonically. Mr. Frezza.

Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office,
FORSCOM Staff Judge Advocate's Office,
and TJAGSA Administrative and Civilian Law Division*

Equal Employment Opportunity

Waiver of EEO Rights

In a recent case, the U.S. Army Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) examined the issue of whether a waiver of the right to file EEO complaints is enforceable. The case involved a last chance agreement in which an employee waived EEO rights. The employee subsequently violated the last chance agreement, and discipline was imposed. The employee filed an EEO complaint alleging handicap discrimination (substance abuse).

EEOCCRA determined that the discrimination complaint must be processed. It did not take a position whether a waiver was void as against public policy, leaving that issue for the courts. Nevertheless, the EEOCCRA recognized *Callicotte v. Carlucci*, 698 F. Supp. 944 (D.D.C. 1988), in which the court granted a preliminary injunction based on its finding that such a waiver violated public policy. The EEOCCRA found that there was no knowing and voluntary waiver, stating that the following prerequisites for a waiver were not met as required by *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986): 1) written advice to the employee to seek advice of an attorney; 2) a reasonable amount of time for the employee to make a decision; and 3) clear, non-technical waiver language. EEOCCRA also raised the issue that voluntariness may be difficult to prove in light of the parties' unequal bargaining positions.

Labor counselors must recognize that the issue of waiver of EEO rights is an unsettled area of the law. Attorneys must ensure that a good factual basis is established to support such a waiver. The fact that the parties may not have an equal bargaining position should not necessarily invalidate waivers. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Supreme Court upheld a waiver of civil rights action under 42 U.S.C. § 1983 in exchange for dismissal of criminal charges. Clearly, the parties did not have equal bargaining positions, but Rumery made an informed decision that he would benefit personally from the agreement. A more diffused public interest in revealing possible police misconduct did not justify a per se invalidation of

waiver agreements. The court held that the agreement served a significant public interest in protecting public officials from having to defend against possibly unjust claims. Further, in *McCall v. U.S. Postal Service*, 839 F.2d 664 (Fed. Cir. 1988), the court held that the fact that an employee may have to make a difficult choice does not invalidate all agreements. As in *Rumery*, the employee was under no compulsion to challenge the agency's action for the benefit of the public. Whether or not to appeal the adverse action was his own private decision. McCall did benefit from the agreement in that he retained his job and had the opportunity to demonstrate acceptable conduct and performance. Nevertheless, the court did not address waiver of EEO rights. The court also distinguished between waiver of rights under a procedural statute and waiver under a statute conveying substantive benefits.

Labor counselors should advise settlement authorities that the issue of waiver of EEO rights is unsettled so that the authorities can make an informed decision about the terms of a last chance agreement.

Age Discrimination—Disparate Impact

To establish a prima facie case of disparate impact, a complainant must prove that a neutral personnel practice falls more harshly on one group than on another. Under the Age Discrimination in Employment Act, an inference of discrimination under disparate impact is not shown based upon subgroups within the protected group (over forty years of age). Although disparate impact cannot be shown when the beneficiary of a personnel practice is over forty, but younger than the complainant, it is possible to show disparate treatment among subgroups over forty. *Lowe v. Commack Union Free School District*, 886 F.2d 1364 (2d Cir. 1989).

Religious Accommodation

Reasonable accommodation of religious practices cannot be conditioned on an agency's determination that an employee's presence is mandatory, rather than permissive, at a religious observance. In a recent case the U.S. Postal Service failed to reasonably accommodate the religious practices of Catholic employees by allowing them to take only five hours of leave on Good Friday, while Jewish employees were allowed a full day of leave

to observe religious holidays. The agency's justification for the different treatment was based on its interpretation of Catholic canon law, which did not require more than two hours of church attendance on Good Friday, and Jewish law, which forbade work on holy days. The EEOC held that an agency had no authority to interpret religious laws or evaluate the sincerity of an individual's religious practices in developing its policy on religious accommodation. *Edwin Cardona and Felipe Borrero v. U.S. Postal Service*, EEOC Appeal Nos. 01882012, 01882013 (Oct. 11, 1989).

This decision should be contrasted with *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986), in which the court held that an agency is not always obligated to provide a religious accommodation of the employee's choice. The agency may reasonably accommodate the religious belief by any action that maintains the employee's employment status and eliminates the religious conflict. If the agency's proposed accommodation does not eliminate the religious conflict, it must implement an employee's alternative proposal unless it would cause an undue hardship on the agency.

Labor counselors should be aware that any disparity in the accommodation of religious groups may be subject to close scrutiny by a third party. To the maximum extent possible, disparities should be eliminated unless the agency can prove that different treatment is necessary to avoid undue hardship on the agency.

Continuing Violations

In a complaint in which an employee alleges a pattern or practice of discrimination, the timeliness requirement of contacting an EEO counselor within thirty days is met when at least one of the acts complained of falls within the thirty-day period. If the alleged acts are interrelated, a complaint of continuing discrimination is cognizable, to include acts that occurred prior to the thirty-day window. *Nanette G. Shaw v. Department of the Treasury*, EEOC Request No. 05890690 (Aug. 31, 1989).

Civilian Personnel

Appellant's Withdrawal of Request for MSPB Hearing Does Not Force AJ to Close Record

MSPB sustained its AJ's decision affirming the agency's removal of appellant for conduct unbecoming an IRS employee. Appellant had shot at her husband and another woman, wounding the woman. The AJ had accepted the IRS argument that the misconduct was egregious and therefore raised a presumption of nexus to the efficiency of the service. Appellant had initially requested a hearing, but she later withdrew the request, attempting to condition her withdrawal on the AJ's limiting the IRS to the evidence already submitted. The AJ nevertheless held the record open to receive additional submissions. The board distinguished the situation from that in *Callahan v. Department of the Navy*, 748 F.2d 1556 (Fed. Cir. 1984), where the court had ruled that if an appellant requests but does not attend a hearing, the AJ may not receive additional evidence from the agency, but must decide the appeal based on

the existing record. The board pointed out that its regulations provide that if an appellant waives a hearing, the AJ will close the record on a date he or she sets for final submissions by both parties. The AJ had authority to keep the record open for additional submissions, subject to the requirement that the opposing party receives copies of those submissions and has an opportunity to comment on them. She properly denied appellant's motion to strike the agency's additional evidence and decided the appeal based solely on the written record. *Robinson v. Dep't of Treasury*, 42 M.S.P.R. 181 (1989).

Labor Law

Review of Labor Relations in FY 89

According to statistics compiled by DCSPER (Labor Relations Bulletin #278), the Army has 232,918 employees who are represented by thirty-one different labor organizations. The American Federation of Government Employees is our largest union representing over one-half of that number. There are 595 individual bargaining units, and over three-fourths of them are AFL-CIO affiliated. Except for two broad areas (the NAF work force and US Army Europe and Seventh Army), the vast majority of non-supervisory, non-managerial employees are represented by a labor union. Virtually all of these are covered by a collective bargaining agreement.

Negotiability disputes have remained constant, with a total of eighteen cases filed and eighty-six proposals at issue. Nine cases were resolved in FY 89 and, of the twenty-three proposals at issue, the Federal Labor Relations Authority ruled that six were negotiable. Three of these proposals concerning random drug testing were subsequently deemed nonnegotiable upon judicial review. *Aberdeen Proving Ground, et. al. v. FLRA*, 890 F.2d 467 (D.C. Cir. 1989).

The Impasses Panel reported thirty requests for assistance from the Army in FY 89. The panel issued a decision and order in 20% of these cases, an increase from 9% in FY 88. The issues in both years included smoking policies, flextime or compressed work schedules, and incentive awards. It should be noted that the Fifth Circuit has held that interest arbitration awards resolving negotiation impasses are subject to agency head review, unless both parties agree to arbitration. If the panel directs the interest arbitration, then the agreement is reviewable under 5 U.S.C. § 7114(c). *Panama Canal Commission v. FLRA*, 867 F.2d 905 (5th Cir. 1989).

The Army's experience at the bargaining table is reflective of the general tenor of labor relations demonstrated by unfair labor practices. In FY 89, 768 ULPs were filed, as compared to FY 88's all time high of 952. Significantly, however, the number of complaints issued by an authority regional director went up—sixty-nine in FY 89, as compared to fifty in FY 88. Therefore, while the unions are not complaining as much, the neutral third party believes more often that we have probably committed an unfair labor practice. Neither the authority nor the administrative law judges have issued any final decisions concerning an Army ULP case in FY 89; the true meaning of the increase remains subject to debate.

In the area of grievances and arbitration, there were 2785 formal grievances filed under negotiated procedure in FY 89. While this is a 1% increase over last year, the rate remains relatively low and constant—twelve per 1000 employees. For whatever reason, however, the number of formal grievances going to arbitration has decreased to 5.5%, as compared to last year's 6.6%. As to who is winning: For FY 89, management prevailed 48% of the time; union 20%, and a split decision was rendered 32% of the time. This continues a trend in the high percentage of split decisions in which both sides "lose." In FY 89, HQDA filed twice as many (ten) exceptions to arbitrators' decisions with the authority. All are pending, except for one that was withdrawn by the Army.

Overall, labor relations appear to have reached a fairly constant workload within the Army, but the scope of practice for the labor counselor can change dramatically each year.

Section 6 Schools and the Courts

In *Fort Bragg v. FLRA*, 870 F.2d 698 (D.C. Cir. 1989), the court reversed the authority and found that a proposal prohibiting the use of personal service contracts to hire teachers was negotiable. This was in line with and based in part on a ruling in *West Point Elementary School Teachers Association v. FLRA*, 855 F.2d 936 (2d Cir. 1988). There, the Second Circuit held that the Army's use of personal service contracts was unlawful, and therefore management was required to negotiate regarding a salary schedule proposal.

The most important case with regard to section 6 schools, however, is *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988), *cert. granted*, 110 S. Ct. 47 (1989). Here, the Eleventh Circuit upheld the authority's position and ruled that the Army was required to bargain over the salaries and fringe benefits of the employees. The Eleventh Circuit's analysis, however, was examined and expressly rejected by the Sixth Circuit in *Fort Knox v. FLRA*, 875 F.2d 1179 (6th Cir. 1989). In *Fort Knox* the court held that wages and other compensation matters fell outside the duty to bargain under the Federal Service Labor-Management Relations Act.

Oral arguments in *Fort Stewart* were heard by the Supreme Court on January 10th. The court was indeed "hot" on the issue, with most justices participating in the repartee. Justice Scalia was especially inquisitorial of the Army's and the FLRA's positions. Justice

O'Connor, while more subdued, was equally probing. The Court was concerned with three issues: 1) the effect of the proposal on the government's right to establish its own budget; 2) whether the legislative history of the Federal Service Labor-Management Relations Act indicated that Congress intended to preclude bargaining over pay; and 3) the lack of clarity in the statutory wording that would likely be used to change the prior past practice of negotiating over pay.

Union Has Right to Consult With Unit Employee Prior to Weingarten Interview

The FLRA General Counsel issued a complaint when the agency refused to permit the union to confer with six unit employees prior to an investigative examination. OGC reasoned that the right to union representation under 5 U.S.C. § 7114(a)(2)(B) includes the right of pre-interview consultation. *Corpus Christi Army Depot*, 6-CA-80035, Nov. 30, 1988, 89 FLRR 1-3010.

FLRA Should Enforce CBA Requirement for Pre-Charge Settlement Attempts

OGC dismissed a union ULP charge when the union failed to comply with a procedure in the negotiated agreement. The agreement required advance notice of intent to file an unfair labor practice charge and attempts at informal settlement before a party could file a charge with FLRA. OGC enforced that pre-charge settlement requirement by dismissing the union's charge of bad-faith bargaining on another matter. *DoDDS, Futenma, Japan*, 98-CA-80440, June 30, 1989, 89 FLRR 1-3019. NOTE: The Atlanta office has been enforcing these pre-charge settlement procedures, but it does not appear to be a universal practice.

A Private Contractor Has a Duty to Give the Union Notice of a Formal Discussion

OGC issued a complaint alleging violation of section 7114(a)(2)(A). The depot had contracted out its employee assistance program, including the requirement to conduct awareness seminars. The depot retained control over the contractor's performance. When the contractor conducted orientation programs on the EAP without notifying the union, the OGC believed it violated the statute. For purposes of section 7114(a)(2)(A), the contractor was a "representative of the agency," when the agency still maintained control over the contractor. *Defense Depot Tracy*, 9-CA-90366, Sept. 30, 1989, 89 FLRR 1-3021.

Contract Law Note

Contract Law Division, OTJAG

The Electronic Bulletin Board for Army Lawyers

LTC Michael J. Wentink
and

LTC Frankie D. Hoskey
Acquisition Law Assistance Program,
Contract Law Division, OTJAG

Within the bowels of the Pentagon, a Zenith PC runs twenty-four hours a day, seven days a week. Its sole purpose is to serve Army lawyers worldwide. This machine is the home for what computer types call an electronic bulletin board system (BBS). The BBS is operated by the Acquisition Law Assistance Program (ALAP) and is therefore called the ALAP BBS. The System Operators (SYSOPS) are the authors plus the newest member of ALAP, Captain Steven Rosso.

ALAP's mission is to support the contract attorney. Accordingly, the ALAP BBS focuses on distributing acquisition law information to its users. Nevertheless, much of the information on the BBS can be equally useful to Army attorneys who are not practicing acquisition law. We have set up the BBS so that ALL Army attorneys can take advantage of its great potential. For instance, the Labor and Employment Law Office uploads their Labor and Employment Law Notes, and the notes will be available electronically even before you see them in *The Army Lawyer*.

The ALAP BBS uses three features to make information available to its users: messages, bulletins, and files.

The Messages

Although there are similarities, ALAP BBS is very different from other office automation and electronic mail (E-Mail) systems. It does not duplicate Optimis (indeed, you will find it much easier to access and use as compared to Optimis), nor will it duplicate the E-Mail and other functions that will be available once the OTJAG NET is up and running.

Yes, you can send mail via the BBS, but it is not the same thing as E-Mail on other systems. On an E-Mail system only the sender and the receiver can view the contents of a message. In contrast, the BBS lets all users view the contents of a message, unless the sender specifically identifies a message to be viewable only by the addressee. Think of the BBS as the hallway bulletin board, where messages are posted for all to see. We encourage BBS message senders to make messages public as much as possible so that all BBS users can follow the dialogue, see the responses, and participate themselves if they desire. Whether the message is addressed to a specific user or to all users, it is "posted" on the board for any user to read.

Messages generally are one or two screens in length and can be posted by any user or by the ALAP BBS SYSOPS.

The Bulletins

Bulletins are generally longer than messages (between one and eight screens) and are loaded on the BBS by the SYSOPS, rather than by the users. These bulletins can be read on-line, or they can be downloaded to your computer for reading at a later time.

There is a wealth of substantive information posted as bulletins. There might be a short article on how to finance replacement contracts; a recent opinion concerning a timely issue; a notice of changes to the UCMJ; TJAG policy memoranda; notes about legislative developments; or the text of a message providing DA policy, guidance, or direction.

In addition, the ALAP BBS maintains scores of bulletins concerning such subjects as how to use the BBS, automation tips, job openings, and JA personnel actions (within minutes after a promotion or other selection list is announced within OTJAG, the SYSOPS post it on the BBS with an announcement to alert the user when he or she first signs on.)

The Files

The files contain application programs, utilities, dexterity exercises, tutorials, and large information files—too large to read on-line as a bulletin. Most of them have been compressed so that they will take up less space on our hard drive and will take less time for you to download them to your computer. To take advantage of these files, you must first download a copy to your computer and uncompress it. The complete instructions for downloading are in bulletin #17 on the BBS.

Users are encouraged to upload public domain, shareware, and user created files. Such files provide other users with information or share utilities and other programs that have been downloaded from other boards.

The uploading feature can also be used to transmit files in a hurry to Contract Appeals Division, Litigation Division, or the Bid Protest Branch. On numerous occasions, Army lawyers in the field have met a suspense through the ALAP BBS.

The Conferences

The ALAP BBS is organized into a MAIN board and a number of conferences. The MAIN board has its own messages, bulletins, and files, and each conference likewise has its own messages, bulletins, and files.

Don't let the term "conference" throw you. The conferences are just like the main board. They are

sub-boards, if you will, that are set aside for certain subject matter areas or for specific groups of users. Conference messages, bulletins, and files can be accessed only while the user is within the conference. Currently, we have conferences for the subject matter areas of CONTRACT LAW, MILITARY JUSTICE, and LEGAL ASSISTANCE. Additionally, there is a separate conference for the users in OTJAG.

As you might expect, the ALAP team concentrates our efforts on the CONTRACT LAW conference. This is where we post messages, bulletins, and files of the most current acquisition law information. This is also the venue for the ALAP team and other contract attorneys to receive and respond to inquiries from other contract attorneys about acquisition law matters. The CONTRACT LAW conference is where contract attorneys network to exchange acquisition law information, ideas, and experiences.

How to Log on the ALAP BBS

Any Army attorney who has access to a PC, a modem, and a phone line can tie into the ALAP BBS. We recognize that this is not yet practical for those in Europe and the Far East, but once they are able to hook into the OTJAG NET with DDN, we will be more accessible to them.

The number for the board is AVN 223-4143, (202) 693-4143. For your Enable setup, use the following: no parity, 8 bits wordsize, 1 stop bit, full duplex, echo off, xon/xoff is supported and VT-100 emulation.

When you first connect, you will be asked "Do you want graphics?" If you are using Enable, answer "no," because the Enable telecommunications module does not support graphics. Then, the BBS will ask for your first and last name. When it does not recognize you as a registered user, it will ask if you want to try your name again or continue. When you continue, the BBS will tell you what it is and who is authorized to use it. Army attorneys can continue by completing the registration questions that it asks of you, to include what you want to use as a password.

Within a day, one of the ALAP SYSOPS will have verified who you are and upgraded your access so that you will have more time allotted per day. You will then

be able to join conferences, download files, and use other features.

Tips on Using the BBS

One of the first things that you will want to do is download the following files: ARCE.COM (it is in the public domain) and its documentation, ARCE.DOC (this is so that you can uncompress many of files that you will be downloading from the board); LIST.COM (this is shareware) and its documentation, LIST.DOC (this is a utility that helps you easily read ASCII files—although Enable can also be used); and PRCM242.ARC and its documentation, PRCMDOCS.ARC (this is PROCOMM version 2.4.2, which you may want to use instead of the Enable telecommunications program—it supports graphics!). All of these programs are in the file directories on ALAP BBS and can easily be downloaded to your computer.

Shareware programs are distributed with the author's permission so that users can test and evaluate the program. Usually the author states a specific period of time permitted for that evaluation. If users continue to use such software beyond the evaluation period, the user must pay the required license fee. On the other hand, programs that have been placed in the public domain may generally be used without paying a license fee. Most shareware and public domain software are accompanied by an ASCII document file that explains the terms and conditions for the program's use.

Conclusion

Information! That's what ALAP is all about. It is designed to make information available to contract lawyers in response to their questions and in anticipation of their needs—possibly, before they even realize that they have a question. This is accomplished through the ALAP BBS, and approximately 260 Army lawyers use this service.

We intend to get bigger and better. Soon, some TJAGSA texts will be available for downloading. We hope to upgrade the software and have more nodes so that more than two of you can use the board at one time. Additionally, we hope that our efforts will encourage other subject matter experts to join with ALAP in providing information to the attorney in the field by using this electronic media, our BBS.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

JAGC Command and Staff College Advisory Board

The JAGC Command and Staff College (CSC) Advisory Board is scheduled to convene on 18 June 1990 to recommend officers for attendance at the U.S. Army Command and General Staff College (USACGSC) for academic year 1991-92. To be eligible for consideration, judge advocates must:

- (1) have credit for completing an advanced course (Military Education Level (MEL) 6); and
- (2) be serving in the grade of major, with more than three years time in grade as of 1 October of the academic year in which the course begins (in this case 1 October 1991); or
- (3) be serving in the grade of lieutenant colonel and have less than 182 months of active federal commissioned service as of 1 October of the academic year in which the course begins (in this case 1 October 1991).

Officers who want the Advisory Board to consider any new matters may submit them to:

HQDA (DAJA-PT)
ATTN: MAJ Rosen
Pentagon Room 2E443
Washington, DC 20310-2206

As only a few judge advocates are selected for this schooling, nonselection does not indicate a lack of promotion potential or value to the Army. Officers not selected are encouraged to complete USACGSC by the correspondence course or USAR nonresident program. Credit for a staff college is a prerequisite for consideration to attend senior service schools and is an important consideration for promotion to higher grades. Information concerning the correspondence course or the USAR nonresident program may be obtained by writing to:

U.S. Army Command & General Staff College
School of Corresponding Studies
ATTN: Registrar, ATZL-SWE-R
Fort Leavenworth, KS 66027

Telephonic inquiries to USACGSC concerning the correspondence course or USAR nonresident program should be directed as follows:

Autovon: 552 + extension
Commercial: 913-684 + extension
Last names beginning with A-E: 5584
Last names beginning with F-K: 5615
Last names beginning with L-R: 5618
Last names beginning with S-Z: 5407

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

The Rule of Reasonableness Revisited: Reemployment Rights of Reservists

Major E. Michael Chiaparas
Chief, Unit Liaison and Training Branch

Introduction

A recent case decided by the Third Circuit Court of Appeals could significantly affect the reemployment rights of members of the Reserve component. *Eidukonis v. S.E. Pa. Transp. Auth.*,¹ which is presently on remand to the United States District Court for the Eastern District of Pennsylvania, held that a reasonableness standard applied when evaluating whether an employer could deny an employee's request for military leave from his civilian employment. The significance of this case, however, is the focus the court places on the factors it will examine in determining the reasonableness of an employee's request. Instead of focusing solely on the employee's actions and presuming reasonableness in

the absence of bad faith, the Third Circuit focused heavily on the needs of the employer. This places the case squarely at odds with the Eleventh Circuit's holding in *Gulf States Paper Corp. v. Ingram*,² a holding that was much more favorable to members of the Reserve component.

At issue in these two cases is the ability of Reserve component soldiers to request extended voluntary leaves of absence from their civilian jobs, while being guaranteed reemployment with their employer. This note will analyze the *Eidukonis* case, contrast it with *Gulf States*, and recommend steps that Reserve component soldiers can take to preserve their rights to reemployment.

¹ 873 F.2d 688 (3d Cir. 1989).

² 811 F.2d 1464 (11th Cir. 1987).

The Statute

A brief discussion of the law affecting veterans' and reservists' reemployment rights is necessary prior to discussing the two cases. The law is codified in the Veterans' Reemployment Rights Act.³ Two provisions of the Act are of particular importance to reservists. Section 2021(b)(3) prevents an employer from denying "hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve Component of the Armed Forces."⁴ This provision prevents an employer from discriminating against an employee because of his or her membership in the Reserve component. Section 2024(d) provides that Reserve employees "shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States."⁵ Note that this statutory provision does not limit the time the reservist may spend on active duty for training (ADT) or inactive duty training (IDT). This point is an important factor in the two cases being discussed. Section 2024(d) then provides that "upon such employee's release from a period of such (ADT) or (IDT), . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes."⁶ This provision requires the reemployment of the reservist upon completion of the training duties. Section 2024(f) makes section 2024(d) applicable to the National Guard.⁷

Eidukonis v. SEPTA

The *Eidukonis* case was filed by an employee of the Southeastern Pennsylvania Transportation Authority (SEPTA) to challenge his dismissal from the company. The basis for the suit was an alleged violation of the Veterans' Reemployment Rights Act.⁸ The employee was hired by SEPTA in 1981, at which time he informed his employer that he was a major in the USAR. At no time prior to Eidukonis's dismissal had SEPTA enacted a policy that either limited its employees' right to take military leave or specified the amount of prior notice required from an employee.

Between the time of his hiring in 1981 and his dismissal in early 1985, Eidukonis took several extended military leaves of absence from SEPTA. He spent 153 days in 1981, 144 days in 1982, 88 days in 1983, 180 days in 1984, and the first two months of 1985 on military leave. All of Eidukonis's leave requests were routinely granted by his immediate supervisor, until the last one in 1985. The background of SEPTA's first, and last, denial of Major Eidukonis's request for military leave was an important factor in the appellate court's decision.

In early 1984 Eidukonis's supervisor asked all of the employees in Eidukonis's three-man section to postpone their summer vacations pending completion of a planned office move. Despite this request, Eidukonis scheduled his two weeks of annual training (AT) for August, and the leave was approved. On the last day of AT, Eidukonis called his supervisor and received approval for an immediate one-week vacation. On the last day of his vacation, Eidukonis requested and received approval for twenty-six days of military leave to work on a computer project at Fort Indiantown Gap, Pennsylvania. Three days prior to the expiration of the tour, Eidukonis was extended another 140 days. This extension was again approved by Eidukonis's supervisor, who believed that he had to approve all military leave requests. During this 140-day period, the supervisor read about a case in which a court upheld the termination of an employee who was abusing his military leave rights.⁹ The supervisor, in desperate need of Eidukonis because of the shortage of personnel in the small section, obtained authority from SEPTA's Deputy General Manager and denied Eidukonis's subsequent request for an additional twenty-six days of military leave immediately following the 140-day tour. Eidukonis sought Army legal advice and was advised that SEPTA could not terminate his employment if he continued to perform his military duties. When Eidukonis continued to work on the computer project after the deadline set by SEPTA to return to work, he was fired.

The district court ruled that Eidukonis was fired solely because of his failure to report back to work following his military leave and not because of any bad faith on his part. The court found in favor of Eidukonis, ruling that his actions were reasonable.¹⁰ The court noted that

³ The Veterans' Reemployment Rights Act is codified, as amended, as part of the Vietnam Era Readjustment Assistance Act of 1974 at 38 U.S.C. §§ 2021-2026 (1982 & Supp. V. 1987).

⁴ 38 U.S.C. § 2021(b)(3) (Supp. V 1987).

⁵ 38 U.S.C. § 2024(d) (1982).

⁶ *Id.*

⁷ 38 U.S.C. § 2024(f) (1982).

⁸ 38 U.S.C. § 2021-2026 (1982 & Supp. V 1987) [hereinafter the Act].

⁹ *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). The court established a rule of reasonableness for interpreting leave requests of reservist-employees under section 2024(d). In this case, a city police officer's request to extend his National Guard leave was ruled unreasonable where the officer, after obtaining his original leave, sought to extend the leave without informing his employer for several weeks and where there were alternate periods in which he could receive the military training that he sought, although he had not informed his employer of this fact. The employee was fired when he continued his military leave after the requested extension had been denied.

¹⁰ *Eidukonis*, 873 F.2d at 692.

Eidukonis was working on a particular military project, that SEPTA had granted long military leaves in the past, and that SEPTA gave no notice of a change in their military leave policy.¹¹

The Third Circuit sent the case back on remand to expand the scope of the district court's inquiry into the reasonableness of the employer's actions in denying leave to Eidukonis. In sending the case back, the court stated that *several* factors should be evaluated in deciding reasonableness, not just the bad faith actions of the employee. The court provided a series of factors that the district court should evaluate in determining the issue of reasonableness, but the court cautioned that the factors were not all inclusive and were dependent on the facts of each particular case.¹²

The Third Circuit first stated that the two-week AT period and recalls for national emergency were per se reasonable.¹³ The court also interpreted section 2024(d) as covering voluntary periods of ADT and IDT, rather than just those periods of duty "required" to be performed.¹⁴ The *Eidukonis* court assumed the military would only allow a reservist to perform additional training if he or she was needed. The court next required the lower court to make an inquiry into whether the employee seeking military leave could volunteer for the military training at a time convenient to his employer.¹⁵

A third factor the court identified for the trier of fact to look at was the reasonableness of the employee's conduct in requesting leave. They disagreed with the standard set by the Eleventh Circuit in *Gulf States*. The *Eidukonis* court ruled that the inquiry, when looking into the conduct of the employee, "is broader" than looking for conduct akin to bad faith.¹⁶ The court indicated that the following areas should be considered when evaluating the employee-reservist's conduct: the duration of the requested leave; the amount of notice

given to the employer when requesting leave; whether there was any evidence of bad faith on the employee's part; and whether the employee received military legal advice.¹⁷

The last major factor that the court believed should be examined was the legitimate needs of the employer. While first stating that the burden on the employer in losing an employee to military duty is not enough, by itself, to lead to a determination that a request for such leave is unreasonable, the court felt that this burden must at least be considered.¹⁸ The court then noted that the following factors should be evaluated when considering the needs of the employer: any special skills of the particular employee; the employer's ability to find a substitute for the employee; any special circumstances concerning the work load during the required leave period; and the extent of additional costs to the employer.¹⁹ The court, in its most important statement, held that as long as the employer does not differ in its approach to granting of leave requests, whether military or non-military, it "need not accede to every leave request, particularly where the request would require the employee to be absent from work for an extended period of time, during periods of the employer's acute need, or when, in light of prior leaves, the requested leave is cumulatively burdensome."²⁰

When considering all of these factors together, it is possible that an employer in the Third Circuit could safely deny most leave requests other than the annual two-week AT tour, which is the only request that the court says is "per se" reasonable.²¹ It would be relatively easy for a company to establish a policy stating that leaves of any kind greater than two weeks in duration will not be approved because of the burden on the continuing productivity of the company. The court's last factor, allowing employers' to deny cumulatively

¹¹ *Id.*

¹² *Id.* at 695.

¹³ *Id.*

¹⁴ *Id.* The issue here was whether the Act applied to voluntary periods of military training above and beyond the training a Reserve component soldier is required to perform each year. In concluding that a reservist could request additional tours of military duty and still remain covered by the Act, the *Eidukonis* court cited *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1469 (11th Cir. 1987), and *Lee v. City of Pensacola*, 634 F.2d 886, 889 (5th Cir. 1981), both of which reached the same determination.

There are four primary methods of training for Reserve component soldiers. They are annual training (AT), inactive duty training (IDT), active duty for training (ADT), and initial active duty for training (IADT). Annual training is the required two-week period of training conducted yearly by all reservists in an active status. IDT is performed by those reservists who are members of Troop Program Units and is conducted on weekends or weeknights throughout the year. These are usually referred to as "drills." ADT is a form of training where the individual soldier can perform additional training beyond the required two-week AT tour. These tours are usually performed when a reservist needs to attend a service school to receive additional training or when he is needed to perform a special project. Major Eidukonis was performing IDT at the time of his firing by SEPTA. See generally, Army Reg. 140-1, Army Reserve: Mission, Organization, and Training (10 July 1989); Army Reg. 135-200, Army National Guard and Army Reserve: Active Duty for Training, Annual Training and Full-Time Training Duty for Individual Members (10 July 1989).

¹⁵ 873 F.2d at 695.

¹⁶ *Id.*

¹⁷ *Id.* at 695, 696.

¹⁸ *Id.* at 696.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *supra* text accompanying note 13.

²² 452 U.S. 549 (1981)

burdensome leave requests, could also lead to a policy preventing any military leave other than the two-week AT tour each year. Thus, a one- or two-week additional request for an ADT tour could be disapproved as being cumulatively burdensome.

Dissent

The dissent in the 2-1 decision believed that the majority's standard for determining reasonableness failed to properly interpret the scope of section 2024(d) and the Supreme Court case of *Monroe v. Standard Oil Co.*²² The dissent would adopt an approach similar to that in *Gulf States*, which focuses more narrowly on the actions of the employee in determining reasonableness of the employee's request for military leave.²³ The dissent would accord the employee's request a "strong presumption of reasonableness" unless the employer rebutted this presumption by showing that the employee acted "highly unreasonably."²⁴ Burden to the employer, while not irrelevant, would only be a factor if the employee had "engaged in questionable conduct."²⁵ The dissent offered examples of an employee's questionable conduct that might lead to a finding that a request is highly unreasonable. They included the following: failure to notify promptly the employer about a planned military leave; violation of an employer's reasonable leave policy without good cause; and taking actions that would cause a significant hardship for the employer.²⁶

The dissent felt the majority standard failed to properly take into account the scope that Congress provided for military leaves in section 2024(d). The judge felt that section 2024(d) was written broadly where it states that reservist's requests "shall upon request be granted."²⁷ In fact, Congress did not set a maximum allowable time

for a period of military leave. In *Cronin v. Police Dept. of New York*²⁸ the court noted that the duration of military leave protected by 38 U.S.C. § 2024(d) is not limited to 90 days, where the statutory language of the Act expressly grants leave for the period required to perform military training. Congress, on two occasions, had an opportunity to revise section 2024(d) and place limits on the period of military leave, but instead left the language intact.²⁹ The *Cronin* court noted that when the Department of Labor briefly imposed a policy limiting the duration of military leave that would be protected by the Act, Congress issued a strong statement of its intent that the protected leave period should not be limited arbitrarily.³⁰ Congress commented in a House-Senate conference committee report that the "Solicitor of Labor's policy" limiting the coverage of the Act to leaves of ninety days or less "was not well founded either as legislative interpretation or application of the pertinent case law."³¹ The majority in *Eidukonis* brushed away these comments in a footnote, noting that the conference committee language was made well after the original Act was passed and stating that it was not authoritative.³²

Most courts that have addressed the subject of length of military leave have concluded that, despite the broad language of the Act itself, which does not specify a limit on the duration or frequency of military leaves, the Act does not cover military leaves of unlimited duration.³³ The court in *Gulf States* stated that the length of time of a requested leave is an appropriate consideration in determining if a leave request is reasonable.³⁴ *Gulf States* then went on to hold that a one-year request for military leave is "not per se unreasonable."³⁵ Even the dissent in *Eidukonis* felt that the "right of reservists to take military leave" is not absolute.³⁶ The important

²³ *Eidukonis*, 873 F.2d at 697 (Becker, J., dissenting).

²⁴ *Id.* at 699.

²⁵ *Id.* at 700 (quoting *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1470 (11th Cir. 1987)).

²⁶ *Id.* at 700.

²⁷ *Id.* at 699.

²⁸ 675 F. Supp. 847 (S.D.N.Y. 1987).

²⁹ *Id.* at 851.

³⁰ *Id.* at 851, 852.

³¹ *Id.* (quoting 1982 U.S. Code Cong. & Admin. News 3012, 3020). Prior to 1982, the Department of Labor (DOL) had interpreted section 2024(d) as imposing no limit on the number, frequency, or duration of a Reserve component soldier's training period for which his reemployment rights were protected. *Barber v. Gulf Publishing Co., Inc.*, 103 CCH LC ¶ 24,859 (S.D. Miss. 1986) (quoting DOL's Veterans' Reemployment Handbook at 111 (1970 ed.)). In 1982 DOL changed its policy and announced that it interpreted section 2024(d) as protecting Reserve component soldiers for only up to 90 days of training over a three-year period. It was this policy that led to the reaction of Congress in the Joint House-Senate conference committee report. Both the *Barber* court and the court in *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352, 355 (N.D. Cal. 1984), found this conference committee report persuasive in reaching findings that there was no statutory limits on the length of the training period protected in section 2024(d). DOL rescinded their revised policy subsequent to the comments of congress in this committee report. Halvorsen, *Which Comes First, the Army or the Job? Federal Statutory Employment and Reemployment Protection for the Guard and the Reserve*, The Army Lawyer, Sept. 1987, at 14, 18.

³² *Eidukonis*, 873 F.2d at 693, 694 n.4. But see cases cited *supra* note 31 for courts that reached a different conclusion as to the authoritativeness of the conference committee language.

³³ See cases cited in Halvorsen, *Which Comes First, the Army or the Job? Federal Statutory Employment and Reemployment Protection for the Guard and the Reserve*, The Army Lawyer, Sept. 1987, at 14, 18 n.31.

³⁴ *Gulf States*, 811 F.2d at 1469.

³⁵ *Id.*

³⁶ *Eidukonis*, 873 F.2d at 699.

factor, however, is the focus that individual courts have placed on the amount of requested leave. The majority in *Eidukonis* would only state that a two-week AT period is per se reasonable, while *Gulf States* stated that a one-year request is not per se unreasonable.

Gulf States Paper Corp. v. Ingram

Because of the different focus of *Eidukonis* and *Gulf States*, it is important to briefly describe the facts in the latter case. Ingram was an Army Reserve medic who sought a one-year leave of absence from Gulf States Paper Corporation to take part in a licensed practical nurse training program. Gulf States filed suit to block the leave request. The district court found the one-year request unreasonable and ruled in the corporation's favor. In overturning the district court's ruling, the Eleventh Circuit noted the following facts: that Ingram was a good soldier who had reached the highest rank (E5) she could receive in her MOS as a basic medic; that the Army had a shortage of licensed practical nurses; that Ingram volunteered for the MOS retraining; that she gave Gulf States four month's notice; and that there were no alternatives to the one-year training.³⁷ The Eleventh Circuit stated that in determining the reasonableness of an employee's request, one began with the presumption that the request is reasonable.³⁸

The court next discussed areas that could not be considered in determining reasonableness. First, it was irrelevant whether or not the training was mandatory. The employee-reservists could volunteer for military training. Second, the Eleventh Circuit said that courts should not judge the reasonableness of military decisionmakers.³⁹ The latter prohibition reflects the courts' deference to the military.

The *Gulf States* court then presented what it felt were the only proper factors for consideration in determining reasonableness: length of leave, actions of the employee, and burden on the employer.⁴⁰ The court held that burden to the employer alone is not sufficient to rebut the strong presumption of reasonableness in a reservist's request for leave. *Gulf States* cited the Supreme Court case of *Monroe*, which, in discussing a similar provision in the Act (section 2021(b)(3)), stated:

The frequent absences from work of an employee-reservist may effect productivity and cause consider-

able inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided in section 2021(b)(3) that employers may not rid themselves of such inconveniences and productivity by discharging or otherwise disadvantaging employee-reservists solely because of their military obligation.⁴¹

Therefore, the Eleventh Circuit reasoned that because a one-year leave request is not per se unreasonable and that burden to the employer alone is not enough, the factor that plays the most important part in determining the reasonableness of a military leave request is the conduct of the employee.⁴² If the court finds action on the employee's part "akin to bad faith," then the employer will overcome the presumption of reasonableness.⁴³ In this case, the facts the court found showing the employees' good faith were the early notification of the employer and the fact that she discussed with her employer the lack of alternate training options available to her.⁴⁴

The dissent in *Eidukonis* would adopt the *Gulf States* standard almost entirely. The only distinction is that, instead of looking for conduct on the part of the employee "akin to bad faith," it would look to see if the employee acted "highly unreasonably."⁴⁵ This distinction is not significant. Both the dissent in *Eidukonis* and the court in *Gulf States* would accord a strong presumption of reasonableness to the employee's request. It is important to note that the majority in *Eidukonis* would not accord such a presumption, finding "no basis in the legislative history or in the Supreme Court's decision in *Monroe*."⁴⁶ This distinction is the key one between the two cases, and the split is of such significance that an eventual resolution by the Supreme Court might be necessary. The Eleventh Circuit would look at the employee's actions and presume reasonableness unless the employer overcame its burden by showing conduct akin to bad faith. The court is deferential to the military's needs and Congress's expressed desires in the Act. The Third Circuit would balance the interests of the employee and the employer, give no presumption of reasonableness to the employees request for leave other than two-week AT each year, and not require the employer to show employee bad faith in order to prove its burden.

³⁷ *Gulf States*, 811 F.2d at 1466.

³⁸ *Id.* at 1469.

³⁹ *Id.* The district court had stated that to require the employer to do without Ingram for 12 months while she changed her MOS "from one that is in current short supply in her unit to another that also is in short supply is simply not reasonable." *Gulf States Paper Corp. v. Ingram*, 633 F. Supp. 908, 912 (N.D. Ala. 1986) (quoted in *Gulf States*, 811 F.2d at 1469). The Eleventh Circuit said that judges were not authorized by the Act to second guess military personnel needs and suggest alternatives. *Id.* at 1469.

⁴⁰ *Gulf States*, 811 F.2d at 1469.

⁴¹ *Monroe v. Standard Oil Co.*, 452 U.S. 549, 565 (1981).

⁴² *Gulf States*, 811 F.2d at 1470.

⁴³ *Id.* at 1469.

⁴⁴ *Id.*

⁴⁵ *Eidukonis*, 873 F.2d at 699.

⁴⁶ *Id.* at 697.

Recommendations

Eidukonis is an example of a bad case making bad law. Major *Eidukonis* was not a popular plaintiff. Even the dissent acknowledged that fact.⁴⁷ It appears that the majority believed that *Eidukonis* abused his military leave privileges.⁴⁸ Because the district court found that *Eidukonis*'s actions did not amount to bad faith and that he was fired solely on the basis of his failure to report back for duty, the Third Circuit had to devise their balancing test to evaluate this case. This led the court to focus equally on the employee's conduct and employer's burden.

Now that the Third Circuit has spoken, it is important for judge advocates in that region to be able to advise their Reserve component clients adequately about their reemployment rights. The first step an employee must take is to establish the reasonableness of his or her actions. The employee should notify the employer well in advance of the requested leave period. The reservist must make every effort to coordinate the specific leave date with the employer. If there is a disagreement and the reservist must attend his training on a certain date, the reservist must explain his or her inability to schedule the training at a different time. If there is an alternate time during which the reservist can train and it is reasonable to do so, the reservist should schedule the training when it is convenient for both parties. If the reservist is going to request military leave greater than two weeks, the reservist should specify a definite end date to the service, if possible. The reservist must also coordinate extensions of military leave with the employer as early as possible. By making these notifications early, the reservist will be able to establish reasonable behavior.

⁴⁷ *Id.*

⁴⁸ The majority went to considerable lengths to note that Major *Eidukonis* disliked his supervisor at SEPTA and that he failed to promptly notify the supervisor of his projected military leaves. They also indicated there was evidence in the record that *Eidukonis* knew his department was going through a very busy period, that staffing was short, and that his absences were straining his department's operations. *Id.* at 692, 696, 697.

⁴⁹ The Department of Labor is primarily responsible for enforcing the Veterans' Reemployment Rights Act provisions. Reservist-employees needing assistance can contact DOL's Veterans' Employment and Training Service at (202) 523-8611. An additional source of assistance within DOD is the National Committee for Employer Support of the Guard and Reserve. This committee in conjunction with smaller committees located in each state seeks to resolve disputes between employers and employees before the dispute gets elevated to DOL and DOJ levels. The national committee's number is (800) 336-4590 or (202) 653-0827.

After taking the above steps to establish reasonableness, the employee and the employee's legal advisor must then analyze the burden of the requested leave on the employer. The burden can be analyzed by using a matrix or sliding scale system. The greater the burden on the employer, the less likely the court will consider a lengthy military leave request to be reasonable. The following factors should be evaluated closely: 1) the employee's position in the company; 2) the ease of finding a replacement with equal skills; 3) the nature of the work load during the time in question; and 4) the extent of additional costs to the employer.

Next, determine if the employer has a leave policy and, if so, review it to see if the employer is complying with it in this case. After looking at all of these factors, the legal officer and the employee should weigh the length of the leave, the needs of the employer, and the cumulateness of the leave in determining whether the request is reasonable. While burden cannot be easily quantified, the greater a combination of these factors weigh in the employer's favor the greater the likelihood that a court will find a lengthy leave request unreasonable. If that burden exceeds reasonableness, the employee probably should not take the leave requested. When in doubt, the employee should consider outside assistance.⁴⁹

Conclusion

Eidukonis could significantly affect the reemployment rights of reservists seeking military leave. Employees must work closely with their commands and employers to ensure that their leave requests are not unduly burdensome to the employers. Close cooperation will benefit both parties, and this will allow employees to serve the military and their employers.

GRA Note

Drilling IMA Position Opportunity

The IMA program was recently modified to include drilling periods similar to those in Troop Program Units. The Office of the Secretary of Defense (OSD) now has an opening for a Drilling Individual Mobilization Augmentee (IMA) in the rank of major, lieutenant colonel, or colonel to serve as the chief legal advisor to the Director of Mobilization Planning & Requirements. The IMA will work with the services, JCS, OSD, and other agencies with mobilization responsibilities to coordinate legal and legislative actions necessary for mobilization.

The officer will also participate in mobilization exercises and JCS CPX's, develop legal position papers on mobilization and induction, and assist in the recall of Reserve components and induction.

Knowledge of Active and Reserve component issues and experience with federal law and the legislative process is preferred. Applicants should reside in the Washington, D.C., metropolitan area. Interested judge advocates should contact MAJ Richard D. Rosen, HQDA (DAJA-PT), Washington, D.C. 20310-2200, (202) 695-1353.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

- April 2-6: 5th Government Materiel Acquisition Course (5F-F17).
- April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).
- April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).
- April 16-20: 8th Federal Litigation Course (5F-F29).
- April 18-20: 1st Center for Law & Military Operations Symposium (5F-F48).
- April 24-27: JA Reserve Component Workshop.
- April 30-May 11: 121st Contract Attorneys Course (5F-F10).
- May 14-18: 37th Federal Labor Relations Course (5F-F22).
- May 21-25: 30th Fiscal Law Course (5F-F12).
- May 21-June 8: 33d Military Judge Course (5F-F33).
- June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).
- June 11-15: 20th Staff Judge Advocate Course (5F-F52).
- June 11-13: 6th SJA Spouses' Course.
- June 18-29: JATT Team Training.
- June 18-29: JAOAC (Phase IV).
- June 20-22: General Counsel's Workshop.
- June 26-29: U.S. Army Claims Service Training Seminar.
- July 9-11: 1st Legal Administrator's Course (7A-550A1).
- July 10-13: 21st Methods of Instruction Course (5F-F70).
- July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).
- July 16-18: Professional Recruiting Training Seminar.
- July 16-20: 2d STARC Law and Mobilization Workshop.
- July 16-27: 122d Contract Attorneys Course (5F-F10).
- July 23-September 26: 122d Basic Course (5-27-C20).
- July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

- August 6-10: 45th Law of War Workshop (5F-F42).
- August 13-17: 14th Criminal Law New Developments Course (5F-F35).
- August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).
- September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).
- September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

June 1990

- 1: UKCL, Employment Law Institute, Ashland, KY.
- 1: NKU, Probate, Covington, KY.
- 1-8: NCDA, Executive Prosecutor Course, Houston, TX.
- 4-8: GWU, Administration of Government Contracts, Anaheim, CA.
- 5: ESI, Truth in Negotiations Act Compliance, San Francisco, CA.
- 5-8: ESI, Operating Practices in Contract Administration, Washington, D.C.
- 5-9: GCP, Cost Reimbursement Contracting, Washington, D.C.
- 7-8: PLI, Acquiring or Selling the Privately Held Company, Los Angeles, CA.
- 7-8: PLI, Construction Contracts and Litigation, San Francisco, CA.
- 7-8: PLI, Hazardous Waste Litigation: Advanced Tactics, New York, NY.
- 7-9: ALIABA, Entertainment, Arts, and Sports Law, Los Angeles, CA.
- 9-15: NITA, Mid-Atlantic Trial Advocacy Program, Philadelphia, PA.
- 11-12: PLI, Annual Antitrust Law Institute, Chicago, IL.
- 13-23: NITA, Southern Regional Program in Trial Advocacy, Dallas, TX.
- 14-15: ABA, Tort and Religion, Boston, MA.
- 14-29: NCDA, Career Prosecutor Course, Houston, TX.
- 17-22: NJC, Administrative Law: High Volume Proceedings, Reno, NV.
- 17-22: NJC, Managing Toxic Torts and Other Complex Cases, Reno, NV.
- 18-22: ALIABA, Estate Planning in Depth, Madison, WI.
- 22: NKU, Family Law, Covington, KY.
- 22-23: UKCL, Real Estate Law and Practice, Lexington, KY.
- 24-29: NJC, Administrative Law: Advanced, Reno, NV.
- 24-29: NJC, Introduction to Personal Computers in the Courts, Reno, NV.
- 25-29: ALIABA, Environmental Litigation, Boulder, CO.
- 25-29: ALIABA, Trial of a Securities Case, Charlottesville, VA.
- 26: PLI, Insurance Program, San Francisco, CA.
- 26-29: ESI, Contract Negotiation, Palo Alto, CA.
- 26-29: ESI, Operating Practices in Contract Administration, Denver, CO.

26-30: GCP, Construction Contracting, Washington, D.C.

28: PLI, Environmental and Toxic Tort Claims: Insurance Coverage, San Francisco, CA.

28-29: ABA, Governmental Liability, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually

Jurisdiction

Nevada
New Mexico

Reporting Month

15 January annually
For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.

12 hours annually
1 February in three-year intervals
24 hours every two years
On or before 15 February annually
Beginning 1 January 1988 in three-year intervals

10 January annually
31 January annually
Birth month annually
31 December of 2d year of admission

1 June every other year
30 June annually
31 January annually
30 June annually
31 December in even or odd years depending on admission
1 March annually

North Carolina
North Dakota
Ohio
Oklahoma
Oregon

South Carolina
Tennessee
Texas
Utah

Vermont
Virginia
Washington
West Virginia
Wisconsin

Wyoming

For address and detailed information, see the January 1990 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government

agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA

publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

- Contract Law**
- AD B136337 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
- AD B136338 Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
- AD B136200 Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK- 86-1 (65 pgs).
- Legal Assistance**
- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD B135492 Legal Assistance Guide Consumer Law/JAGS-ADA-89-3 (609 pgs).
- AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
- AD B136218 Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
- AD B135453 Legal Assistance Guide Real Property/JAGS-ADA-89-2 (253 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B114052 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
- AD B114053 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
- AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
- AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
- AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
- AD B124120 Model Tax Assistance Program/JAGS-ADA- 88-2 (65 pgs).
- AD-B124194 1988 Legal Assistance Update/JAGS-ADA- 88-1
- Claims**
- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
- *AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- *AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

- *AD B139523 Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).
- *AD B139525 Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

- AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).

Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>	<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 25-3	Army Life Cycle Management of Information Systems	27 Nov 89	DA Pam 700-55	Instructions for Preparing the Integrated Logistic Support Plan	29 Dec 89
AR 27-40	Legal Services Litigation, Interim Chg. 101	27 Nov 89	UPDATE 2	Military Occupational Classification and Structure	31 Oct 89
AR 600-8-3	Unit Postal Operations	28 Dec 89			
AR 640-10	Individual Military Personnel Records, Interim Chg. 101	15 Jan 90			

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

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